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HINDU LAW

PRINCIPLES AND PRECEDENTS

Revised and Enlarged

BY
Dr S. VENKATARAMAN, I.A.S., M.L.L.

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SUPPLEMENT

LATEST DECISIONS

OPERATION OF HINDU LAW

Ref Vol I, Ch. II, Sec. 29.— Joseph v. George, 1979 Ker. L. T. 128.—Ordinarily on conversion to Christianity, a Hindu would cease to be a member of the caste to which he belonged, but this is not an invariable rule. It would depend on the structure of the caste and its rules and regulations. There are some castes where this consequence does not follow on conversion since such castes comprise both Hindus and Christians.

If a person who has embraced another religion can be reconverted to Hinduism there is no reason why he should not be able to come back to his caste if the other members of the caste are prepared to readmit him as a member.

Once a person ceases to be a Hindu and becomes a Christian, the social and economic disabilities arising because of Hindu religion cease and for this reason he is deemed not to belong to a scheduled caste. But when he is reconverted to Hinduism the social and economic disabilities revive as these are disabilities inflicted by Hinduism.

MARRIAGE

Vol. I, Ch. III, Sec. 42 Bikash Kumar Mukherjee v. Nanda Rani Mukherjee, A. I. R. 1979 Cal. 358.—1 Where a man and a woman were living together for a long time, the man acknowledged the woman's children as his own and treated the woman as his wife, they were recognised by all persons concerned as man and wife and were so described in documents such as ration card, voters' list and school registers, there is a strong presumption that the woman was the wife of the man and the children his legitimate children.

2 Where the factum of celebration of some form of marriage is established, the Court can, in the circumstances of the case, raise the legal presumption of lawful marriage arising out of long cohabitation and repute.

Ibid Sec 50 Bikash Kumar Mukherjee v. Nanda Rani Mukherjee, A I R 1979 Cal 358—A marriage between a Brahmin and a non-Brahmin, where it was performed after 1949 and before the enactment of the Hindu Marriage Act of 1955 was valid by virtue of the provisions of the Hindu Marriages Validity Act, 1949.

SONSHIP AND ILLEGITIMACY

Vol I, Ch. IV, Sec. 69 : Shyam Sunder Prasad Singh v. State of Bihar, A I R 1981 S. C. 178.—The practice of appointing a daughter as a putrika to beget a son who would become the putrika putra had become obsolete several centuries ago. The daughter's son was promoted in rank next only to his maternal grandfather and his mother whose interest in the estate was a limited one. Viewed from this situation, the reason for abandoning the practice of appointing a daughter as putrika and treating her son as putrika putra becomes clear, when a person had two or more daughters, the appointment of one of them would give her primacy over the wife and the other daughters (not so appointed) and her son (appointed daughter's son) would succeed to the exclusion of the wife and other daughters and their sons and also to the exclusion of his own uterine

brothers *i.e.*, the other sons of the appointed daughter. Whereas in the case of plurality of sons, all sons would succeed equally, in the case of appointment of a daughter, other daughters and their sons along with the wife would get excluded. It is probably to prevent this kind of inequality which would arise among the daughters and daughters' sons, the practice of appointing a single daughter as a putrika to raise an issue must have been abandoned, when people felt that their religious feelings were satisfied by the statement of Manu that all sons or daughters whether appointed or not had the right to offer oblations and their filial yearnings were satisfied by the promotion of the daughters' sons in the order of succession next only to the son as the wife and daughters had been interposed only as limited holders.

ADOPTION

Vol I Ch V, Sec 143 at P 147 Tara Bai v Babgonda, A I R 1981 Bom 13 1980 Mah L J 566—When a married man is given in adoption, his son at the date of adoption does not lose his place in the original family nor lose the gotra or right of inheritance in the family of the father before adoption. The adopted person's wife however passes into the new family as also a son already conceived at the time of the adoption. Such son will be entitled to the father's property in the adoptive family as his heir.

MINORITY AND GUARDIANSHIP

Vol I, Ch VI Sec 202 Sri Aurobindo Society v Ramadoss Naidu, (1980) 1 M. L. J. 118—A *de facto* guardian is not one who acts for the nonce. He is a factual guardian who acts in regular course over a period of time. He lacks as compared with a *de jure* guardian the legal authority to act for the minor.

Ad hoc guardians are neither *de jure* nor *de facto* guardians. They are self appointed guardians for the minors just for the occasion as it comes along. Transactions by these are void and *non est*. No question of ratification arises and even if the minor affirms the transaction nothing could flow from such affirmation.

MAINTENANCE

Vol I, Ch VII, Sec 21—Sampoornamma v Rajendran, (1980) 2 M L J 35 : A I R 1980 Mad 239—The moral obligation of the coparceners to give a share in the property to a daughter has now become transformed into a legal obligation. No rationale of logic or acceptable reason can be found for drawing a hard line between the case of a daughter and that of a sister for holding that only the daughter is entitled to get a small share of the joint family property as gift from her father, but a sister is not entitled to get such a benefit from her undivided brother.

When the moral obligation to make provision for maintenance of a daughter can be extended to the case of a niece *i.e.*, brother's daughter, there is no reason why the obligation cannot cover the case of a helpless sister as well.

Ibid Sec. 223—Appala Lakshmi Narasimha v. Sundaramma, (1981) 1 An. W. R 71 (F B.)—The legal liability upon a Hindu heir to provide maintenance to a *daughter-in-law* exists irrespective of the fact whether the heir takes the property by intestacy or under a will.

or a gift. All the texts of Hindu Law point out that there is a moral obligation on the *father-in-law* to maintain the *daughter-in-law* and that the heirs who inherit the property are liable to maintain his dependants. It is the duty of the Hindu heirs to provide for the bodily and mental or spiritual needs of their immediate and nearer ancestors to relieve them from bodily and mental discomfort and to protect their souls from the consequences of sin. They should maintain the dependants of the persons to whose property they succeed. Merely because the property is transferable by gift or by will in favour of the heirs the obligation is not extinct. When there is property in the hands of the heirs belonging to the deceased who had a moral duty to provide maintenance, it becomes a legal duty on the heirs. Cf., *Ram Sarup v Patto*, A. I. R. 1981 P & H 68.

Lakshmi Narasamma v. Sundaramma, A I. R 1981 A. P. 88. It makes no difference whether the property is received either by way of succession or by way of gift or will, the principle being common in either case.

The status of a widowed *daughter-in-law* is equivalent to that of a widow, who has indisputably a right to maintenance out of the property transferred as gratuitous, and the right of the *daughter-in-law* should be treated as equal to the right of a widow on the principle enunciated in section 39 of the Transfer of Property Act. The status of a widowed *daughter-in-law* is equal to that of a widow for the purpose of receiving maintenance and her moral right alters into a legal right on the demise of her father-in-law. The claim to maintenance originating from the status acquired by marriage becomes a legal right independently of the father-in-law's volition and comes into existence at the same moment as the dispositions in favour of a volunteer become operative.

JOINT FAMILY

Vol I, Ch VIII, Sec 234 *Kalyani v Narayanan*, A I R 1980 S C 1173—There is no concept known to Hindu law that there could be a branch of family wife-wise. Thus if a Hindu father has two wives and he has three male children by the first wife and two by the second, each wife constituting a branch with her children is a concept foreign to Hindu Law.

Ibid, Sec 249. *Raj Kishore Misra v Bikhari Misra*, A I R 1981 Orissa 48—The real test as to blending is to see whether the acquirer intended to throw it into the common stock and not to claim separate title to the property.

Ibid Sec 250: *Ram Kali v. Dilip Kumar*, A I R 1980 P & H. 345—According to the Mitakshara law a gift of affection by a father to his son does not constitute *ipso facto* ancestral property in the hands of the donee and a sale of such land by the latter could not be challenged by his own son.

Ibid Sec 263. *Chander Sah v. Mt. Godhani*, A I. R 1981 Pat 43—There is no presumption that a family because it is joint possesses joint property or any property. When in a suit for partition a party claims that a property or item of property belongs to the joint family the burden of proving that it is so rests on the party asserting the same. Where the karta had no sufficient means out of which the property acquired by a member by a sale deed from a stranger during the lifetime of the karta could have been acquired, the property would be deemed to be the self-acquired property of the acquirer. (See also *Shibram Missir v Tularani Missir*, A I R 1980 Pat. 237).

Govindarajan v Sadasivam Chettiar (1980), 2 M L J. 435—There is no presumption that property, standing in the name of the karta or member of the joint family is joint family property nor is there any presumption that any repurchase by a member of a joint family property which had been conveyed to a stranger enures only for the benefit of the family

Debaraj Pradhan v. Ghanshyam, A. I. R. 1979 Orissa 162.—Where acquisitions stand in the names of all individual members of a joint family there is no presumption of their being joint family property. He who claims such acquisitions as joint family property must prove availability of sufficient nucleus. Failure to discharge the burden gives rise to the presumption of equality of interest under Section 45, Transfer of Property Act

Muthuswamy Gounder v Rangammal If a person claiming to be a member of a Hindu undivided family pleads that he is entitled to a share in certain properties which according to him are joint family properties, it is for him to prove such character of the properties, likewise in regard to property standing in the name of a female member

Sita Ram v. Gowri Shankar, (1979) 5 A. L. R. 481—The necessary joint family nucleus being found, the acquisition of the house of which the room in suit formed part by a person in the name of his son when his own father was still alive and looking after the affairs of the joint family and managing them would not be sufficient to hold that the house was the self-acquired property of the acquirer and not property of the joint family

Nasirabad Urban Co-operative Bank Ltd v. Gyan Chand, A. I. R. 1980 Raj 73—A contractor's business does not become a new business merely because after the execution of an earlier job a new job is undertaken for execution. Similarly if such a business comes to a standstill after the death of the father who died leaving surviving him infant sons and a widow, it does not become a new business if the widow or one of the sons, on attaining majority revives the same business

Shibram Missir v Tularam Missir, A. I. R. 1980 Pat. 237.—Offerings or charity received by the hereditary panda for services done to the client would be the income of such person, it would belong to the family where such services are rendered by the members jointly or in the exercise of the family right. Such moneys after distribution among the members become self-acquisition of the individual member

Ibid, Sec. 272 and Sec. 273 Dura v. Devarayalu, (1980) 1 M. L. J. 507—According to Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. He may however validly make a gift of his interest with the consent of the other coparceners

A gift of his interest by a coparcener being void altogether, there is no estoppel or other kinds of personal bar precluding the donor from asserting his rights to recover the transferred property

An individual coparcener can make over his interest in joint family property in favour of the entire coparcenary as such. In such a case it would be in the nature of a renunciation

Where properties are transferred by two major coparceners to the only other coparcener who at the relevant time was a minor, there is no question of the gift becoming invalid merely because the consent of the minor had not or could not be taken

The case of a minor coparcener as beneficiary under a settlement executed by the major coparceners can be taken as an exception to the general principle that a transaction of gift of joint family property would be void *in toto* and would not bind even the donor. Nor can the principle that there can be no gift of joint family property except within reasonable limits apply where it is in the nature of a release or renunciation. Though the minor alone is the beneficiary he represents the rest of the family.

Ibid, Sec. 275 : *Nasirabad Urban Co-operative Bank Ltd v Gyan Chand*, A. I. R. 1980 Raj 73.—A Hindu widow notwithstanding her interest in the coparcenary and her right to demand partition is not a coparcener and cannot become the manager of the coparcenary consisting of herself and her sons.

Ibid, Sec. 283 : *Govindarajan v Sadasivam Chettiar*, (1980) 2 M. L. J. 435.—The manager of a Hindu joint family has no absolute power of disposal over joint family property for a charitable purpose and the extent of the property gifted, whether it was reasonable or out of proportion could not therefore arise for consideration.

Sri Sai Baba v Hanumantha Rao, (1980) 2 M. L. J. 518.—Though the first plaintiff* was a minor at the date of the impugned alienation, his father the first defendant could, in the instant case, have challenged the alienation by filing a suit within 12 years from the date of the sale to have it set aside. Limitation having begun to run from that date as against the first defendant it will also run against the first plaintiff his son and the second plaintiff who was his grandson.

Ibid, Sec. 302 : *Durai v. Devarajulu Naidu*, (1980) 1 M. L. J. 507.—A Hindu father or other managing member has no power to make a gift of ancestral property except within reasonable limits and that too only for pious purposes.

DEBTS AND ALIENATIONS

Vol. I, Ch. IX, Sec. 301 : *Biprocharan Sabato v. Bauri Sabato*, (1979) 47 Cut L. T. 553.—The fundamental rule is that a Hindu son is not liable for an *avyavaharika* debt contracted by his father. The facts, circumstances and the conduct of the father are to be looked into to ascertain the nature and character of the debt in each case.

Prasanjit Mahtha v. United Commercial Bank Ltd, A. I. R. 1979 Pat. 151.—A surety bond executed by a father to pay the debt of a company creates a personal liability falling within "*vyavaharika*", that is, lawful, usual and customary, and the joint family estate in the hands of the son is bound by such debt. The son is liable in view of his pious obligation.

Shyam Sunder Bhartia v. Gowri Shankar Bhartia, A. I. R. 1980 Cal. 230.—Payment by a purchaser of joint family property on an overdraft account to the father's bank is not an *avyavaharika* debt and a sale by a father cannot be challenged by the son by reason of pious obligation.

Laikunniissa v. Hari Prasad, (1979) 5 A. L. R. 431.—A decree debt for the recovery of rent due from the father is not *avyavaharika* and the son cannot disclaim liability.

PARTITION

Vol I, Ch X, Sec. 329 • Krishnabai v Appasaheb, A. I. R. 1979 S. C. 1880.—In a joint Hindu family governed by the Mitakshara law, unity of ownership of the family property and commensality of its enjoyment are the essential features. Cesser of this unity and commensality means cesser or severance of joint family status or partition under Hindu law irrespective of whether it is accompanied or followed by a division of properties by metes and bounds.

The division of joint status may be brought about by any adult member of the joint family by intimating indicating or representing to the other members in clear and unambiguous terms, his intention to separate and enjoy his share in the family property in severalty. Such intimation, indication or representation may take diverse forms, such as an explicit declaration, oral or written, or the conduct of the family members in dealing separately with the former family properties, or service of notice, or separate possession against the other coparceners.

Kalyani v Narayanan, 1980 S C 1173.—To constitute a partition all that is necessary is a definite and unequivocal indication of intention by a member of a joint family to separate himself from the family. What form such intimation, indication or representation of such interest should take would depend upon the circumstances of each case. A further requirement is that this unequivocal indication of intention to separate must be to the knowledge of the persons affected by such declaration. A review of the decisions show that this intention to separate may be manifested in diverse ways. It may be by notice or by filing a suit. Undoubtedly, the indication or intimation must be to members of the joint family likely to be affected by such a declaration. Partition is a word of technical import in Hindu Law. Partition in one sense is a severance of joint status and coparcenary of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Such an unequivocal intention to separate brings about a disruption of joint family status at any rate, in respect of the separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of the joint family as a tenant-in-common. Such partition has an impact on devolution of share of the such member. It goes to his heirs displacing survivorship. Such partition irrespective of whether it is accompanied or followed by division of properties by metes and bounds covers both a division of right and division of property. A disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may at any time, be claimed by virtue of the separate right. A physical and actual division of property by metes and bounds follows from disruption of status and would be termed partition in a broader sense.

Commissioner of Gift-Tax v. Veerappa Chettiar, (1980) 1 I T J 417—Partition as a severance of joint status is a matter of individual volition. All that is necessary is a definite and unequivocal indication of the intention by a member of the joint family to separate himself from the family and enjoy his share in severalty. In what form the intimation or indication should take place would depend on the circumstances of each case.

The declaration of intention should however be to the knowledge of the person affected, for a mere uncommunicated declaration may amount to no more than harbouring an intention to separate. The assent of the other member is not necessary.

Where the karta of a Hindu undivided family had declared before the Authorised Officer under the Land Ceiling Act that there was a partition between him and his son and subsequently he executed a settlement deed in favour of his son and married daughter it was held that the declaration or admission was the best evidence of separation especially when it was made before a public authority affecting the status of the person concerned, it being immaterial whether the authority accepted the declaration or not, as the status of a person in a matter like this is governed by his intention and not by the acceptance of some one else.

Ibid., Sec. 331 : Kalyani v Narayanan, A I R. 1980 S C 1173—A Hindu father, joint with his sons and governed by Mitakshara Law, in contradistinction to other manager of a Hindu undivided family or an ordinary coparcener, enjoys the larger power to impose a partition on his sons with himself as well as amongst his sons *inter se*, without the consent and that larger power to divide the property by metes and bounds and to allocate the shares to each of his sons and to himself would certainly comprehend within its sweep, the initial step *viz.*, to disrupt the joint family status which must either precede or be simultaneously taken with the partition of property by metes and bounds. But he has no right to make a partition by will of joint family property amongst various members of the family except of course if it could be made with their consent.

Ibid., Sec. 334 Nasirabad Urban Co-operative Bank Ltd v Gyan Chand, A I R 1980 Raj 73—The institution of a suit by a coparcener for partition and allotment of shares-effects a severance of joint status so as to constitute a division in status.

Ibid., Sec. 336 . Sita Ram Prasad v Mahadeo Rai, A I R 1980 Pat 254—An oral partition is not prohibited and when a partition is established the presumption is that it is a complete partition of the family properties among the members of the family.

Ibid Sec 360 : Sri Sai Baba v Hanumantha Rao, (1980) 2 M L J 518—Where family properties have been alienated by the managing member and they are in the possession of third parties, the person seeking partition of family properties has to canvass the sales to third parties and seek a prayer for setting them aside. In the absence of specific pleadings the plaintiff's claim in relation to the alienated items must fail.

Ibid., Sec. 364 : Smt Sughrani v Hari Shankar, (1979) 2 S C C 463—A minor can reopen a partition alleged to be unfair and prejudicial to his interest even when there was no fraud or misrepresentation and the interest of the minor was represented by his father as guardian.

Ibid., Sec. 365 : Kalyani v Narayanan, 1980 S C 1173—Once disruption of joint family status takes place, it covers both a division of right and division of property. If a document clearly shows the division of rights and status its legal construction and effect cannot be altered by evidence of subsequent conduct of parties.

Where one of five sons is separated, unless a reunion is pleaded, the other four sons cannot constitute a corporate body like a coparcenary, by agreement or even by subsequent conduct of remaining together enjoying the property together.

Where a document brings about a specification of shares, once such shares were defined by the father who had the power to define, and vest the same, there is a disruption of the joint family. A division of rights and division of property by allotment of shares takes place. The mode of enjoyment immediately changes and members of such family cease to be coparce-

ners holding as joint tenants, but they hold as tenants-in-common. Subsequent conduct of some of them to stay together, in the absence of any evidence of reunion, as understood in law, is of no consequence. In any event when one of the sons of the second wife sought and obtained physical partition of the properties allotted to him and left the family, there being no evidence whether others agreed to remain united except the so-called evidence of subsequent conduct which is irrelevant or of no consequence, disruption of status was complete.

Merani Rupj Vinza v Malibai Keshav, (1980) 21 G L R 615—The principle that the moment the shares are declared by a preliminary decree in favour of coparceners and other persons entitled to a share under the law that would constitute his or her right to share, as of right, in the property cannot be projected to and applied in a case where there is a partition by agreement between the coparceners in which a person entitled to share has not been declared to be a sharer or to whom no property has been allotted.

GIFTS AND WILLS

Vol I, Ch XI, Sec 378. Dura v Devarajulu, (1980) 1 M. L. J. 507—A Hindu father or other managing member has no power to make a gift, except within reasonable limits of ancestral property and that too only for pious purposes.

Ibid, Sec 401: Banwari Lal v Trilok Chand, A I R 1980 S C 419 (1980) 1 S.C.J. 349—A joint family consisted of two brothers *G* and *J*. The latter died in 1940 leaving his widow *C* who succeeded to his interest. Both *G* and *C* executed wills on the same day devising property to *B* described as *G*'s adopted son. Under *G*'s will his estate was to go to *C* as life-tenant and thereafter to *B* his adopted son. The widow *C*'s will bequeathed the entire property to *B* adopted son of *G*. *G* died in 1952 and *C* in 1955. As a matter of construction of the wills, it was held that the will executed by *G* in favour of *B* was valid and operative though the adoption was not void. *B* would take because the relationship was merely a description of the devisee as understood by the testator not because of the relationship brought about by the adoption but by reason of feelings of affection which the devisee had earned by his association. It was further held that the will executed by *C* would be operative in favour of *B* to the extent of the properties taken by her from *G* because she did nothing more than carrying out the behests of her own testator which bequest was good in law and would have been effective even if she had made no will in favour of *B*. But to the extent she overstepped her rights in devising her husband *J*'s property the will would be inoperative and her reversioners and not the devisee would succeed to *J*'s share in the family properties.

Ibid, Sec 404: Vanitaben v Divaliben, A I R 1979 Guj 116—There is no presumption that the amounts deposited by a husband in the bank accounts in the joint names of himself and his wife exclusively belong to her. The presumption on the other hand would be that the amounts belong to the husband. The English law rule that a gift to the wife will be presumed where money belonging to the husband is deposited in a bank in the name of the wife or in the joint names of husband and wife has not been admitted in Indian law.

THE LAW OF INHERITANCE

Vol I, Ch XII, Sec 425: Krishna Singh v Mathura Ahir, A I R 1980 S C 707—For a person to be regarded as a sanyasi, it must be shown that he has actually relinquished and abandoned all worldly possessions and all desire for them or that such ceremonies are performed indicating the severance from his natural family and his secular life.

(2) In the case of orthodox sanyasi, it must be proved that necessary ceremonies like *pindadana* or *birajahoma* or *prajapathyeshhi* have been performed, without which the renunciation will not be complete or effective

(3) Among Dasnamis, the *birajahoma* is considered essential. The recitation of the *presha* mantram or the renunciation formula is indispensable

(4) The question whether a person has become a sanyasi has to be determined not according to the orthodox view but according to the usage or custom of the particular sector or fraternity. A religious denomination or fraternity enjoys complete autonomy in the matter of laying down the rites and ceremonies which are essential

(5) According to the Sastras, in the strict legal view Sudras cannot become sanyasis. Though the orthodox view does not sanction or tolerate ascetic life of the Sudras, the existing practice all over India is quite contrary to such orthodox views

(6) At the present time there is no distinction or barrier. A Hindu of any caste may adopt the life and emblems of the order of sanyasi or dandi

(7) In cases where according to usage a Sudra can enter into a religious order in the same way as in the case of the twice-born castes such usage will be given effect to

(8) Asceticism in India, perhaps more than in any other country has been under the definite and strong influence of religion. In its origin probably remote from Brahmanism and conveying the ordinary idea that bodily pain was profitable for the purification and advancement of the spirit, the ascetic life in association with the Hindu religion and under the prescriptive sanction of Hindu law itself has become a refuge from the burden of caste rules and ostracisms

Ibid Sec 430 *Periasami v Periaithambi*, (1979) 2 M L J 147—An undivided son's right over the self-acquired property of his father is as *sapatibandha* daya or obstructed heritage. Such property is taken by the undivided sons as tenants-in-common not as coparceners with rights of survivorship *inter se*

A divided son is excluded in regard to the sharing in such property by the undivided sons

WOMEN'S ESTATE

Vol I Ch XIV, Sec 528 *Nasirabad Urban Co operative Bank Ltd v Gyan Chand*, A I R 1980 Raj 73—Where a mortgage executed by the widow was a transaction which any prudent owner would have entered into in the ordinary course of management in order to benefit the estate and make it possible for the family business of contractors, the only source of livelihood for the family to be revived, the alienation is one for legal necessity and is valid

Ibid, Sec 545 *Lalji Maitra v Shyam Behari Mehra*, A I R 1979 All 379—A surrender by a widow to be effective must be of her entire interest in the whole of the property in which she had a widow's estate

Surrender is not an act of alienation by the widow, nor does the reversioner occupy the position of a grantee or transferee, nor does he derive his title from her. He derives his title

from the last male holder and the rights of succession are opened by the widow's act of self effacement which operates in the same manner as his physical death

THE LAW OF RELIGIOUS AND CHARITABLE ENDOWMENTS

Vol I Ch XV, Sec 566 Profulla Choran Requitte v Satya Choran Requitte, A I R 1979 S C 1682 · (1979) 3 S C C. 409—There is a distinction between a public and private debutter. In a public debutter or endowment, the dedication is for the use or benefit of the public. But in a private endowment, when property is set apart for the worship of a family idol, the public are not interested. The distinction is important, because the results logically following therefrom have been given effect to by Courts, differently. According to English Law, the beneficiaries in a private trust, if *sui juris* and of one mind, have the power or authority to put an end to the trust or use the trust fund for any purpose and divert it from its original object. Whether this principle applies to a private endowment or debutter created under Hindu Law, is a question on which the authorities are not agreed.

Ibid, Sec 567 Hanumantha Rao v Sri Sai Baba, (1980) 2 M L J 507 : 93 L W 328—The fact that the trustee under a private trust is not accountable to others in administering the trust will not make the trust illusory.

Ibid, Sec 568 Phani Bhusan v Kenaram Bhuniya, A I R 1980 Cal 255—Where the evidence showed that only a portion of the income of the property was spent for the seva puja of the deity it was only a partial dedication and it was not non-debutter. The property was therefore alienable by the shebait. The transferee will take the property subject to the charge.

Ibid, Sec 570 : Hanumantha Rao v Sri Sai Baba (1983) 2 M L J 507 · 93 L W 328—The worship of gurus who have been held in reverence by their disciples and of warriors who were held in esteem was not unknown among the Hindus. Therefore the mere fact that the idol was in a human form cannot make it (sic) any the less a deity if it is worshipped as personifying the Supreme Being. It is also well-known that the Hindu religion recognises or tolerates the worship of certain deities personal to them, that is, 'Itsa Devatha'. As a matter of fact Hindu religion preaches the worship of personal God and such personal God may take the shape of the guru or sage who has exhibited certain extraordinary spiritual power.

Normally the images worshipped by the Hindus are visible symbols representing some form of the threefold attributes of God based on the Hindu idea of Trinity, namely, creator, preserver and destroyer. The object of worship is not the image but the God believed to be manifest in the image for the benefit of the worshippers who cannot conceive or think of the deity without the aid of perceptible form on which they may fix their minds and concentrate attention for the purpose of meditation. According to the Hindu notions the image itself is not the God but it is the visible personified deity manifesting itself to the devotees by means of the image. Where a Hindu dedicates property for the worship of a God by means of an image the property is, by a legal fiction, deemed to be vested in a juristic or juridical person, and the God which is believed to be manifest in the image is to be deemed the fictional person holding property. Material image is merely a means of worship of God and the consecrated image is the body of which the invisible spirit is the soul.

Ibid Sec. 582: Idol of Shri Radhaji v State of M. P., 1979 M. P. L. J. 80—Though a Hindu idol is a juristic entity with power of suing and being sued the juridical person in the idol is not the material image. It is not correct to say that the image itself develops into a legal person as soon as it is consecrated and vivified by the *pranpratishtha* ceremony, nor is it correct to say that the Supreme Being of which the idol is the symbol or image is the recipient and owner of the dedicated property. The idol as representing and embodying the spiritual purpose of the donor is the juristic person recognised by law and in this juristic person the dedicated property vests.

Ibid Sec. 587 Profulla Choran Requittee v Satya Choran Requittee, A. I. R. 1979 S. C. 1682 (1979) 3 S. C. C. 409—Property dedicated to an idol vests in it in an ideal sense only, *ex necessitate*, the possession and management has to be entrusted to some human agent. Such an agent of the idol is known as *Shebait* in Northern India. The legal character of a *Shebait* cannot be defined with precision and exactitude. Broadly described, he the human ministrant and custodian of the idol is its earthly spokesman, its authorised representative entitled to deal with all its temporal affairs and to manage its property. As regards the administration of the debutter, his position is analogous to that of a trustee, yet he is not precisely in the position of a trustee, in the English sense because under Hindu Law, property absolutely dedicated to an idol, vests in the idol and not in the *Shebait*. Although the debutter never vests in the *Shebait*, yet peculiarly enough, almost in every case, the *Shebait* has a right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom, if not devised by the founder. As regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office, out even so, it will not be quite correct to describe *Shebaitship* as a mere office. 'Office and property are both blended in the conception of *Shebaitship*'. Apart from the obligation and duties resting on him in connection with the endowment the *Shebait* has a personal interest in the endowed property. He has, to some extent, the rights of a limited owner. *Shebaitship* being property, it devolves like any other species of heritable property. It follows that where the founder does not dispose of the *shebait* rights in the endowment created by him, the *Shebaitship* devolves on the heirs of the founder according to Hindu Law if no usage or custom of a different nature is shown to exist.

Durga Prosad Mullick v. S. S. Rameswar Jew Siba Thakur, A. I. R. 1981 Cal. 92—Mere execution of a deed of arpannama dedicating property by a limited owner (widow) will not be sufficient. Prescribing the rule of primogeniture as the mode of devolution of *shebaitship* is against the provisions of Hindu Law.

Ibid Sec. 588 Krishna Singh v Mathura Ahir, A. I. R. 1980 S. C. 707—A math is an institutional sanctum presided over by a superior, who combines in himself the dual office of being the religious or spiritual head of the particular cult or religious fraternity, and of the manager of the secular properties of the institution of the math.

The property belonging to a math is, in fact, attached to the office of the mahant, and passes by inheritance to no one who does not fill the office. The head of a math, as such, is not a trustee in the sense in which that term is generally understood, but, in legal contemplation, he has an estate for life in its permanent endowments and an absolute property in the income derived from the offerings of his followers, subject only to the burden of maintain-

ing the institution. He is bound to spend a large part of the income derived from the offerings of his followers on charitable or religious objects. The words 'the burden of maintaining the institution' must be understood to include the maintenance of the math, the support of its head and his disciples and the performance of religious and other charities in connection with it, in accordance with usage. A I R 1922 P C 123 and (1910) I L R 33 Mad. 265, relied on.

Ibid Sec 589 Swami Harbansachari Ji v State of Madhya Pradesh, A I R 1981 M P 82—Maths were for the first time established by Shankar Math is clearly distinct from the other religious trust known as debutter, the essential element of which is a deity or an idol. The presiding element in a Math is an ascetic or religious teacher. With his disciples and co-disciples, he forms a spiritual family. Both these institutions owe their existence to grants of property made by pious benefactors. In the case of debutter, the grantee is an idol. In the case of Math the beneficiary or fraternity of religious men headed by a superior or Mahant represent the entire institution. The primary object of debutter is to perpetuate the worship of a deity. Since the preceptors of this monastic institution (Math) combined high standard of spiritual knowledge with moral purity, large grants of land were made in their favour by princes and noblemen. The worship of God was not excluded if it was essential as a part of the religious teachings of a particular Math. It cannot, however, be said that there cannot be a Math without an idol. In the case of a temple or a shrine, property vests in the idol as a juristic person. In the case of a math property does not vest in the Mahant.

Ibid Sec 589 Radhamohan Deb v Nabakishore Naik, (1979) 48 Cut. L T. 178—A scheme can be framed even in the case of a private debutter.

Ibid Sec 600 Phani Bhusan v Kenaram Bhuniya, A I R 1980 Cal 255—In the case of a partial debutter it is not necessary to prove legal necessity or to show that the sale was made for the benefit of the estate.

Surendra Nath Pramanick v State of West Bengal, 83 Cal W N 525—The transfer of a portion of debutter property by a shebait in the absence of legal necessity is not void but enures for the lifetime of the transferor shebait.

Ibid Sec 608 Santhanam Iyer v Sundarathammal, (1981) 2 M L J 8—Where a trustee in the context of a particular case is only a dharmakartha the law regarding succession to the office is clear. There are two ways of devolution of the office of dharmakartha or trustee. It is possible for a donor to prescribe any mode of devolution of trusteeship untrammelled by any other restrictions as regards the nature of the estate. But when he does not do so, devolution is governed by ordinary rules of Hindu law, statutory or otherwise. The right of succession to the office cannot hang in the air. It has to be governed either by the arrangement made by the founder or by the general law.

Ibid Sec 608 Satya Deo v Beharji Maharaj, A I R 1980 All 220—A Sarbarkar or manager of an endowment cannot change the line of succession or nature or object of an endowment by making it a pre-condition for making a gift to the endowment.

A Sarbarkar is in the capacity of a manager of an endowment. He can always accept a gift of property to the endowment. If there are no conditions attached, he may or may

not accept the gift. If he accepted the gift with the conditions he will be bound by them. But when he himself is the donor of the gift it is not permissible to him to make a gift with a condition and accept the condition so as to bind the endowment.

Ibid Sec 614 Krishna Singh v Mathura Ahu, A I R 1980 S C 707—Succession to mahantship is regulated by the custom or usage of the particular institution, except where a rule of succession is laid down by the founder himself who created the endowment.

Even where the mahant has the power to appoint his successor, it is the custom of the various maths that such appointments should be confirmed or recognised by the members of the religious fraternity to which the deceased mahant belonged.

In some maths, the mahantship descends from guru to chela, the existing mahant alone appoints his successor, but the general rule is that the maths of the same sect in a district or maths having a common origin are associated together, the mahants of those acknowledging one of their members as the head, who is for some reason pre-eminent, and on the occasion of the death of one the others assemble to elect a successor out of the chelas or disciples of the deceased, if possible, if there be none of them qualified then from the chelas of another mahant.

Rukminibhai Guru Rajdharbuwa Mahanubhav Sukenke v Nanabhuwa Guru Umaba, Mahanubhav Sukenkar 1979 Mah L J 186—(1) Once a math is established succession to headship takes place within the spiritual family according to the usages that grow up in a particular institution. (2) In a math it is the custom or practice of a particular institution which determines as to how the successor is to be appointed. (3) If the grant had laid down any rule of succession that is to be given effect to. In the absence of any grant, the usage of the particular institution is to be followed. (4) In various institutions, the custom is that in order to entitle the chela to succeed he must be appointed or nominated by the reigning mahant during his lifetime or shortly before death. (5) When a mahant has a right to appoint his successor he may exercise the right by act *inter vivos* or by will. (6) It is possible for the mahant of a math to make over the endowment during his lifetime to his chela whom he appoints as his successor. (7) Ceremonies for installing a successor-in-office of a mahant cannot be deemed to be essential. (8) In a suit laying claim to partition of property of a mahantubhav math, if neither in the plaint nor in the written statement there is any reference to any custom or usage governing succession, the suit is liable to be dismissed. (9) Unless the plaintiff proves the usage under which he succeeds, the fact that the defendant is a trespasser will not help.

Ibid Swami Harbansachari Ji v State of Madhya Pradesh, A I R 1981 M P 82—Since the head of a math should be a celibate and devote himself to religion, a nomination of successor may be void if the person chosen suffers from bodily infirmity or disease or leads an immoral life. Marriage *per se* is not a disqualification but the initiation of a married man must be by the entire and permanent separation by him from his wife and by giving up all worldly ties.

Ibid Sec 615 Amar Prakash v Prakasha Nand, A I R 1979 S C 845—A person who is not a chela but accepted as one can be validly appointed as successor to a mahant.

Ibid Sec 618 Anath Bandhu v Krishna Lal Das, A I R 1979 Cal 168—A line of succession to shebaitship contrary to Hindu law is not valid, such as in tail male.

VOL II-HINDU SUCCESSION ACT

Vol. II Hindu Succession Act

Sec 3 Nanasahab v Parwatibai, 1980 Mah L J 586 —The phrase "related by blood" in Section 3 (1) (a) cannot be equated with 'related by birth' and includes the relation that comes because of marriage

A brother's wife is an 'agnate' within Section 3 (1) (j) and entitled to succeed as such

Sec 6. Scope Mulchand Thirani & Sons v C I T, (1980) 121 I T R 976 —The section uses the word "Mitakshara coparcenary property" and not the words "joint family property". The Mitakshara rule of survivorship comes into play only when there are at least two coparceners and one of the dies leaving the other coparcener. So sec 6 cannot apply where a Hindu dies without leaving a coparcener. It has no application to property received by a member of a joint family on partition.

Commissioner of Agricultural Income-tax v Parameswara Bhat, 1980 Ker L T 276 —Sec 6 does not operate to bring about an automatic disruption of a Hindu undivided family on the death of any of its members occurring subsequent to the commencement of the Act. The carving out of the share of the deceased as per the proviso will not affect the continuance of the joint family or bring about its disruption so far as the surviving members are concerned and they will continue to constitute a joint Hindu family with the seniormost male member functioning as karta.

Ramalingam v Manicka Goundar, (1980) 2 M L J 350 —Section 6 as well as its proviso apply only to cases where a male Hindu dies possessed of an undivided interest in Mitakshara coparcenary property and not when he dies possessed of absolute property. Where the property concerned was to be regarded as the absolute property of the deceased under the customary law of Pondicherry the section has no application. The concerned property did not undergo any transformation as to its character by reason of the introduction of the Hindu Succession Act to that territory.

Ibid, Proviso Maharani Raj Laxmi Kumari Devi v Controller of Estate Duty, (1980) 1 I T J 390 —The proviso to section 6 creates a fiction only for the purpose of the section. The fiction is only for the purpose of fixing the persons who are entitled to succeed to the property of the deceased coparcener. It does not effect a disruption of the coparcenary during the lifetime of the coparcener.

Baidyanath Prasad Misra v State of Bihar, A I R 1981 Pat 24 —Notional partition or partition by fiction could come into play only when there was no evidence of actual partition by agreement or of any family arrangement.

Where on the death of a Hindu coparcener there was a partition and 26 out of 111 bighas were allotted to the widow of the deceased and separate returns were filed by the widow and the other coparcener under the Ceiling Act, the Ceiling Authorities could not by reference to the notional partition hold that the widow was having a half share in the land in the face of the actual partition already effected.

Mulchand Thirani & Sons v C I T, (1980) 121 I T R 976—Where the proviso to the main sec 6 is applicable, the interest of a male Hindu dying intestate in coparcenary property must devolve by intestate succession under sec 8 and not by survivorship

Sec 8 Scope Mulchand Thirani & Sons v C I T, (1980) 121 I T R 976—The proviso to main S 6 and S 8 read with the schedule and S 19 of the Act shows that the nature and character of an ancestral property under the Mitakshara law have been completely abrogated where the provisions of the Act are applicable. An ancestral property inherited by a son on the intestate death of his father under the provisions of the Act cannot, therefore, be a coparcenary property at all in his hands

Section 8 provides that the "property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter". It uses the words "the property of a male Hindu". No word of limitation is attached to this expression. Therefore, this expression includes all properties, whatever their nature and character may be, except the interest of a male Hindu in a Mitakshara coparcenary property which has been taken out of the purview of this section by S 6 where it applies

Smt Manshan v Tej Ram, A I R 1980 S C 558—The custom in Punjab preventing daughters from inheriting the father's property is superseded by section 8 and hence the heirs of a collateral are no longer entitled to succeed to the property of a male Hindu dying intestate either not having made a will or having made an invalid one

Sec. 14 Scope Keshar Bai v State of Maharashtra A I R 1981 Bom 115 (F B)—The nature of the property in the hands of the limited owner has no particular relevance in construing sec 14 (1)

Kesharbai v State of Maharashtra, 1981 Mah L J 1 A I R 1981 Bom 115 (F B)—The full ownership conferred upon a Hindu female would have all the attributes of full ownership as is understood normally in law. The first consequence is that there is no question of reversion after the death of the Hindu female, she would constitute a fresh stock. Succession to this property will be governed by the provisions of the Hindu Succession Act and not by the Shastric Hindu Law. Being full owner she is entitled to dispose of the property by transfer *inter vivos* or by will. This property of the Hindu female can well be compared with the self-acquired property of a Hindu male. The effect of vesting of the full title in the Hindu female by the provisions of Sec 14 (1) is to substantially change the nature of the property and the status of the adopted son

Lalji Maatra v Shyam Behari, A I R 1979 All 379—If an instrument, decree, order or award gives recognition or effect to an antecedent right possessed by a Hindu female, the case would fall under section 14 (1), if however such right is created for the first time in consequence of such instrument the case would be covered by sec 14 (2)

A family arrangement extinguishing and obliterating all antecedent rights of the executants and conferring life-estate on a widow falls to be governed by sec 14 (1)

Adinarayana Patra v. Ramabari Patra, A I R 1980 Orissa 95—Where there was a pre-existing right, an award giving property to a widow though restricting her power of alienation, it would be covered by sec 14 (1)

Ibid, Possession Kamalabai v Annapurnabai, 1980 Mah L J 250 [Cf, *Ram Sarup v Patto*, A I R 1981 P & H 68]—Possession constructive, possession symbolical and possession actual are all situations covered by the word “possessed in sec 14 (1)”

Where a widowed mother was allotted property giving her the right to recover and enjoy the rent for her maintenance and the widow was actually recovering the rent and so enjoying and maintaining herself the case falls under sec 14 (1)

Ibid Maintenance grants Rajammal v Lakshmi, (1980) 1 M L J 450—A widow must have acquired some kind of title, however restricted it may be and whatever its nature may be. In the absence of acquisition of any such interest in the property, the mere residence by a pre-1937 widow in the family residential house as a member of the family cannot enable her to claim that she had acquired a right with reference to the residential house which would enable her to claim the benefit of an enlargement of that interest by the operation of sec 14 (1) of the Act

In the absence of a right in favour of the widow in the property and the recognition of such a right and the allotment of the property in lieu thereof, the mere possession of the first defendant in the instant case, cannot be equated to her having acquired any ‘limited interest’ in respect of the suit property. The factual finding of the two lower Courts is to the effect that the first defendant was merely residing in the family house as a member of the joint family after the death of her husband and continued to live so even after his death and therefore mere residence cannot be equated to acquisition by the first defendant of the ‘limited interest’ in the house which could get enlarged into an absolute estate and could be bequeathed by the first defendant in favour of the second defendant. In this view, it must be held that the provision, of sec 14 (1) would not assist the appellant to claim benefit of the bequest under the will of her mother the deceased first defendant

Janki v Goinda Sheno, A I R 1980 Ker 218—A testator’s giving right to a widow to reside in a family house and also to receive some money and paddy does not create any interest in favour or in lieu of maintenance so as to attract either sec 14 (1) or sec 14 (2).

Bai Vajra v Thakorbbhai Chalebbhai, A I R 1979 S C 993 [see also *Baby v Prabhavathi*, 1979 Ker L T 903]—The widow’s right to maintenance though not an indefeasible right to property is undoubtedly a pre-existing right. It is true that a widow’s claim to maintenance does not ripen into a full-fledged right to property, but nevertheless it is undoubtedly a right which in certain cases can amount to a right to property when it is charged. It cannot be said that where a property is given to a widow in lieu of maintenance, it is given to her for the first time and not in lieu of a pre-existing right. The claim to maintenance as also the right to claim property in order to maintain herself is an inherent right conferred by the Hindu law, and therefore, any property given to her in lieu of maintenance is merely in recognition of the claim or right which the widow possessed from before. It cannot be said that such a right has been conferred on her for the first time by virtue of the document concerned and that before the existence of the document the widow had no vestige of a claim or right at all

Sec. 14 (2) does not operate to take the property acquired by a Hindu female in lieu of maintenance or arrears of maintenance out of the purview of Sec 14 (1)

Sec 15 "Sons and daughters in sub-Sec (1) (a) —Kasturi Bala Mandal v Tribanga Mandal, A I R 1980 Cal 334, Namdeo v State of Maharashtra, 1981 Mah L J 25 — The expression "sons and daughters" appearing in Sec 15 (1) (a) can only mean sons and daughters of the female Hindu dying intestate and cannot include the sons and daughters of the husband of the Hindu female. The sons and daughters of the husband by his predeceased wife have no claim

Sec 22 Scope Tarak Das Ghosh v Sunil Kumar Ghosh, A I R 1980 Cal 53 —Thr right under Sec 22, the preferential right of a co-heir to purchase the share of another co-heir is a right of pre-emption. Therefore an application made beyond the period of limitation prescribed by Art 97 of the Limitation Act would be barred

A decision on an application under Sec 22 of the Hindu Succession Act is not open to appeal, the same not being one of the orders specifically made appealable by the Civil Procedure Code

In cases where any statute creates a right without specifying the procedure for enforce, ment thereof, resort should be to the procedure mentioned in the Civil Procedure Code. Accordingly the right conferred by Sec 22, Hindu Succession Act can be enforced only by the institution of a regular suit

Sec 23 Scope Mookammal v Chitravadivammal, (1980) 1 M L J 310 93 L W 98 —Sec 23 of the Hindu Succession Act, 1956, is intended to respect one of the ancient Hindu tenets which treasured the dwelling house of the family as an impartible asset as between a female member and a male member. In order to perpetuate that memorable tenet of Hindu families, Parliament took that auspicious aspect also into consideration while codifying the Hindu Law. It is only in that perspective that Sec 23 of the Hindu Succession Act, 1950 has to be understood

The section provides a special provision safeguarding dwelling house. It puts, as it were, a statutory interdict on a female heir to claim partition of the dwelling house until the male heirs choose to divide their respective shares therein. An equitable provision for a female heir, has however, been thought of during the intermission when the abovesaid interdict would operate. During that intermission, the female heir shall be entitled to a right of residence. The proviso to Sec 23 slightly waters down such a right in the case of a female heir who is a daughter. Such a family heir who is a daughter shall be entitled to a right of residence in the dwelling house only if she, is unmarried or has been deserted by or has separated from her husband or is a widow. A question would arise in a case where the members of a particular family consist one female member, and one male member. The statute has made a special provision for that purpose also. But if the only male member chooses to introduce of a stranger into the dwelling house by parting with his share in the property, it will not be satisfying the usual concomitants which are attached to and integrated with a dwelling house. Once, the only male member of the family in the presence of other female members chooses to alienate his share in the dwelling house, it would no longer be a dwelling house, as mentioned in the special provision made under Sec 23 of

the Hindu Succession Act. *Es instanti* the male member as above parts with his one-half share in the property, then the property as a whole should be equated to an ordinary property which does not possess the characteristics of a dwelling house. In that view of the matter, therefore, the interdict contemplated in Sec. 23 of the 'Hindu Succession Act' would not apply to the case where the only male member in the presence of a female member but without her consent, sells his share in the quondam dwelling house to a stranger by which there is a natural metamorphosis of the dwelling house into an ordinary house.

Janabai Ammal v Palani Mudaliar, (1980) 1 M. L. J. 492—Sec. 23 of the Hindu Succession Act, 1956 is a special provision dealing with the partition of a dwelling house and the rights of the male and the female heirs of the intestate therein. There can be no doubt that a female heir specified in class I of the Schedule to the Act inherits a share in a dwelling house absolutely. But Sec. 23 postpones the right of such a female heir to claim partition of the dwelling house until the male heirs choose to divide their respective shares therein. The object behind this section seems to be to prevent fragmentation or disintegration of a family dwelling house at the instance of a female heir or heirs to the prejudice of the male heirs. This is based on the principles embodied in Sec. 44 of the Transfer of Property Act and Sec. 4 (1) of the Partition Act. The provisions of Sec. 23 of the Hindu Succession Act, debar the female heir or heirs from claiming partition of the dwelling house except on the happening of a contingency when the male heirs come to a division of the same. But the right of the female heir to claim partition on the happening of the said contingency contemplated under that section does not in any way annihilate or destroy or whitt down her legitimate share in the dwelling house. The only restriction imposed by Sec. 23 is to postpone the right of claiming partition of such share during the period of interregnum from the time of the death of the intestate till the happening of the contingency contemplated therein. The restriction is strictly confined to the right of such female heir to ask for partition of the family dwelling house and operates only (1) if the whole family dwelling house is occupied by the members of the family of the intestate and (2) until the male heirs choose to divide their shares in it. The real intentment of the section is to defer the right of the female heirs specified in class I of the Schedule to demand actual partition of the family dwelling house in occupation of the members of the family of the intestate and to keep such right in abeyance until the male heirs specified in class I of the Schedule choose to divide their respective shares therein.

Parliament while enacting Sec. 23 of the Act, should have felt that the dwelling house of a Hindu joint family would be regarded as an impartible asset treasured by ancient Hindu tenets and as such the dwelling should be allowed to be preserved by the family until the male heir or male heirs, as the case may be, mentioned in class I of the Schedule opted for dividing the same and to that extent Parliament wanted to recognise the traditions and sentiments so cherished by ancient Hindu families from time immemorial. If the male member chooses to divide it among the respective sharers or alienate his share to a stranger, then it would mean that the contingency has arisen whereby the male members are no longer capable of preserving the dwelling house. That is why Parliament has, under the section, allowed the female members to claim partition in case the male members choose to divide their respective shares in the house. Till then the unmarried female members are given a right of residence therein. It is but just that the family dwelling house should be allowed to be kept by the male members till they choose to divide it, and the female members should not be persons responsible for the disintegration and fragmentation of the dwelling house. It is significant to note that the proviso

to S 23 preserves the right of residence of a female heir who is unmarried or is deserted by or has been separated from her husband, or is a widow. If Parliament had intended that Sec 23 should not apply to the case of a single male heir, and that the female heirs in such a case could seek division of the dwelling house, it would have certainly made a specific provision respecting that contingency by at least adding a proviso to that effect to Sec 23.

There are certain hard cases where, for instance, the intestate has left only a big mansion in the form of a dwelling house and no other property, survived by a single male heir and one or more female heirs. In such cases, even though the female heirs are entitled to a share in the property of the intestate under the Act, such right would practically be defeated and frustrated since there is no possibility of the single male heir choosing to divide the shares in the property of the intestate, and thus the right of the female coheirs to have a partition of their shares is likely to be successfully obstructed for ever. In such cases, the right to demand partition, vested in the female heir, will be permanently postponed and ultimately frustrated. Such hard contingencies would cause great hardship to the female heirs, but that cannot be avoided. Sec 23 of the Act deserves modifications so as to avoid difficulties of interpretation leading to divergent views and consequent anomaly.

Ibid. "Wholly occupied by the members of the family" *Vanitaben Bhaishanker v Divaliben Premji*, A I R 1979 Guj 116.—Where a property was not wholly occupied by the members of the family of the deceased and a part was in the occupation of a tenant, even if the property is taken as a dwelling house on the ground that a substantial part of it is being used for the purpose, even then, requirement of the occupation of the entire property by the members of the family is not satisfied.

Sec 25 Disqualification for murder *Mst Biro v Banta Singh*, A I R 1980 P & H 164.—Sec 25 has been enacted as a matter of public policy and an adopted son who murdered his adoptive father is not entitled to succeed to the estate.

Sec 30—Testamentary Succession *Sonam Topgyal Bhutia v Gompu Bhutia*, A I R 1980 Sikkim 33.—The history of Hindu wills shows that even from long before any legislation declaring the competency of the Hindu to make testamentary dispositions, such power was very much there, and was established by a course of practice which, in itself, was enough to establish an approved usage and was expressly recognised by the Bengal Inheritance Regulation (1793), and Bengal Wills and Intestacy Regulation (1799), and also by a series of judicial decisions. Thus before the Hindu Wills Act, 1870, purported to confer on the Hindus the power to make wills by making the provisions of the Succession Act, 1865, applicable to Hindus, the power of the Hindus to make wills was accepted and recognised by legislation and judicial decisions and, therefore, the power of Hindus to make wills in India was not created by, and was not to be traced from direct legislation.

Maharani Raj Luxmi Kumari Devi v Controller of Estate Duty, (1980) 1 I T J. 390.—All that section 30 does is to lift the bar on testamentary disposition of undivided property of a coparcener in coparcenary property. It does not impinge on other rights which a coparcener has under Hindu law. It does not affect the existence of coparcenary or coparcenary property.

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At page 934, after line 12, add Violation of conditions (i) (iv) and (v) and position of spouse Sheela Wati v Ram Nandani, A I R 1981 All 47—A marriage though null and void for contravening any of the conditions prescribed in clauses (i), (iv) and (v) has yet to be regarded as a subsisting fact and cannot be said to be wholly *non est* in law or a nullity so long as it is not declared to be null and void by a decree of nullity of the District Court, on a petition presented by either party thereto against the other party to the marriage. No third person can treat it as void or have it adjudicated to be null and void in any other suit or proceeding unless it has already been declared to be so by a decree of nullity of a District Court in accordance with the procedure prescribed by the Act. The only exception is the case where the aggrieved spouse of the first marriage on account of whose being alive the second marriage is void prosecutes the other spouse for bigamy under the Indian Penal Code read with Sec 17 of the Act or where the aggrieved spouse prosecutes the guilty spouse for contravention of Sec 5 (iv) and (v) under Sec 18 (b)

Bajirao v Tolanbai, 1979 Mah L J 693—A woman whose marriage is void as contravening Sec 5 cannot apply for maintenance under Sec 125 of the Criminal Procedure Code, 1973

While construing Sec 125 of the Code it will not be proper to introduce the concept arising out of the provisions of Sec 25 (1) of the Hindu Marriage Act. The jurisdiction contemplated by the two sections are distinct and specified

At P 974 add also No Injunction lies Smt Parwati Devi v Harbindra Singh, A I R 1980 Raj 249.—There is no provision in the Act for granting an injunction against the other party restraining him or her from contracting a marriage with another person. As there is no provision in the Act for filing a suit for permanent injunction restraining the other spouse from marrying with another person, it is not permissible for any Court to grant any temporary injunction also in a suit under the Act. A I R 1967 Pat 220, A I R 1968 Mad 387, A I R 1974 Delhi 207, A I R 1974 Pat 335, Rel on

Sec 7 "Customary rites and ceremonies" Bajirao v Tolanbai, 1979 Mah L J 693—For a valid marriage which alone can confer the status of a wife, not only must the ceremonies under the personal law be gone through but the marriage must conform to the statutory requirements of Secs 5 and 11

Rajdei v Lautan, A I R 1980 All 109—Where evidence showed that "pau-puja" was done according to the custom of the caste and there was nothing on record to show that 'saptapadi' was one of the ceremonies necessary for a valid marriage between the parties in accordance, with the customary rites and ceremonies of the parties the evidence that "pau-puja" was done would be sufficient for bringing about a valid marriage. It is not the law that it must be proved that 'saptapadi' was performed in every case where the factum of the marriage is in question. The party who affirms that there was no marriage in accordance with the customary rites and ceremonies of the parties must also prove that such rites and ceremonies include saptapadi "

Sec. 9 "Restitution available for either spouse" Sukram v Mishri Bai, A. I R 1979 M P 144—A marriage in contravention of clause (iii) of Sec 5 could neither be declared to

be *ab initio* void or voidable. So where a girl who was married while she was a minor and after attaining majority came and lived with her husband condoned, the defect, he cannot be refused restitution of conjugal rights on the ground that the marriage was in contravention of Sec 5 (iii)

Sec 10 'Grounds for judicial separation' *Kamla Devi v Atma Ram*, (1979) 5 A L R 376—As a result of the 1976 amendments, while it was necessary formerly even for claiming judicial separation that the cruelty must be such as cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for her/him to live with the other spouse, now a petitioner is entitled to a decree of divorce if he/she proves simply that the other spouse, now a petitioner has after the solemnisation of the marriage treated him/her with cruelty

The distinction between Sec 10 (1) (b) and Sec 13 (1-A) is that cruelty to be a ground of divorce had to be persistent and repeated while as a ground for judicial separation it is not necessary that it should have been persistent or repeated

Smt Sulekha Bairagi v Prof Kamala Kanta Bairagi, A I R 1980 Cal 370—According to the provisions of Sec 10 (1) (b) of the unamended Act, it was necessary for the petitioner to prove that the cruelty was of such a character as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the other party. The amended Sec 13 (1) (1-a) says that a decree for divorce can be passed, if the other party has, after the solemnisation of the marriage, treated the petitioner with cruelty. The position of law is still the same, even after the amending Act of 1976 has come into force. Even after the amendment, cruelty simpliciter will not suffice. The petitioner will have to prove to that cruelty is of a nature such as to give rise to a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the other party. Ordinarily a single act of violence is not sufficient. But it is possible in the particular circumstance even for a single act of a grossly violent character to constitute, legal cruelty"

Angrea Kaur v Baldev Singh, A I R 1980 P & H 171—Where on maltreatment by the husband and turning out of the wife, the latter secured an order under Sec 488 of the former Criminal Procedure Code and after living in separation for 15 years, the husband petitioned for divorce under Sec 13 the husband was held not entitled to the relief as the wife could not be held guilty of desertion and that all that could be done was to pass a decree for judicial separation envisaged under Sec 13-A without prejudice to the executability of the order passed under Sec 488, Criminal Procedure Code

Sec 11 Scope *Ana Devi v Bachan Singh*, A I R 1980 All 174—Section 11 enables either party to the marriage to have it declared null and void. It does not confine the right to present a petition to the aggrieved party alone

Kamla Devi v Atma Ram, (1979) 5 A L R 376—Though section 11 gives a right to the parties to file a petition for declaring the marriage a nullity, the filing of petition is not a condition precedent for putting an end to the marriage

Gurucharan Kaur v Ramchand, (1979) 81 Punj L R 382—After the 1976 amendments where on a petition for declaring a marriage a nullity had been dismissed and pending appeal the husband died, no decree of nullity can be passed in favour of the wife

Sec 12 Impotency *Shakutala Kumari v Om Prakash Ghai*, A I R 1981 Delhi 53 — Where the husband did not plead that there was non-consummation of marriage due to impotency of the wife but pleaded that he had sexual intercourse 4 or 5 times after marriage and it was incomplete only on certain occasions and medical evidence showed that the wife was capable of sexual intercourse no case could be said to have been made out with regard to Sec 12 (1) (a)

Ibid. Unsoundness of mind or mental disorder or insanity or epilepsy *Roshanlal v Kadembari*, 81 Punj L R 232 — Under Sec 12 (1) (b) as amended by the Marriage laws (Amendment) Act of 1976, if it is proved that the wife had suffered from recurrent attacks of epilepsy before her marriage with her husband, he would be entitled to get his marriage annulled by a decree of nullity

Ibid Fraud *Mohinder Kaur v Bikkar Singh*, A I R 1979 P & H 248 — Where a marriage had been procured by fraud, a subsequent single act of cohabitation after discovery of the fraud would be a ground for the dismissal of a petition for nullity, since such act amounts to condonation

Sec 13 "Divorce" *Gopalakrishnan Nair v Sarasamma*, 1979 Ker L T 810 — The right to obtain dissolution under the Hindu Marriage Act does not extend to cases where provision has been made for the purpose in special enactments. The provisions of the Travancore Nair Act concerning the right to obtain dissolution of the marriage are not affected by Sec 13 of the Hindu Marriage Act

Dr Srikant Rajgacharya Advy v Anuradha, A I R 1980 Karn 8 — As a result of the 1976 amendment cruelty and desertion apart from being grounds for judicial separation have also been made grounds for divorce

Sulekha Bairagi v Kamala Kanta Bairagi, 84 Cal W N 716 A I R 1980 Cal 370 — The husband, respondent No 1 in the appeal filed a petition against his wife the appellant for divorce on the ground of the wife's adultery or in the alternative for judicial separation on the ground of cruelty. He alleged that on the 13th September, 1970, at about 10 P M at night he had come to his house and when he opened the door of a room which was closed but unbolted, he found his wife in a compromising position with the co-respondent. At the bidding of his wife, the co-respondent hit him on the head with the bolt of the door as a result of which he was grievously injured and had to be hospitalised for 21 days. He informed the police after the incident and instituted criminal proceedings against his wife and the co-respondent. Both were convicted but on appeal by the wife (the co-respondent had not preferred any appeal), the wife was acquitted. After a delay of about three and a half years, the petitioner filed his petition for divorce or in the alternative for judicial separation as mentioned before. He explained the delay in filing the petition by stating that although he had informed the police and instituted criminal proceedings, he was persuaded by his father-in-law, not to file any petition for divorce in order to give a chance to his wife to mend her ways. Since the incident of the night of the 10th September, the petitioner had been living separately from his wife in a rented house being apprehensive of his safety. The trial Judge disbelieved the story of adultery and rejected the prayer for divorce but he granted a decree for judicial separation on the ground of cruelty. The wife preferred an appeal. The husband also filed a cross-objection on the ground that after the amendment of Sec 13 of the Hindu

Marriage Act, 1955 by the Marriage Laws Amendment Act, 1976, he was entitled to a decree for divorce on the ground of cruelty It was held (i) The delay in bringing the petition for divorce or judicial separation had been reasonably explained in the circumstances of the case

(ii) The amendment of Sec 13 by the Marriage Laws Amendment Act, 1976 is retrospective in operation and applied to pending applications

(iii) Cruelty in order to fall within the amended Sec 13(1a) is not cruelty simpliciter but must be of such a nature as to give rise to a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for him or her to live with the other party. Ordinarily a single act of cruelty would not be sufficient for the purpose. But it is possible in the particular circumstances of a case even for a single act of grossly violent character to constitute legal cruelty

Ibid Proof of sexual intercourse *Dr Saroj Kumari Sen v Dr Kalyan Kanta Ray*, A I R 1980 Cal 374.—Divorce being a civil proceeding, analogies of criminal law are not applicable and adultery can be proved by preponderance of probability

Smt Sulekha Bairagi v Prof Kamala Kanta Bairagi A I R 1980 Cal 370 —The husband's statement as to adultery cannot be conclusive without corroboration

Ibid Cruelty *Dr Srikant Rangacharya Adya v Anuradha*, A I R 1980 Karn 8 — Legal cruelty is not confined to causing physical acts of injury by one spouse to the other. There may be cruelty without an intention to injure. Failure to comply with one of the essential obligations of the marital life by the husband would amount to subjecting the wife to cruelty. It is one of the principal obligations on the part of the husband to satisfy the sexual urge of his wife which is a natural instinct. Married life without a sexual life will be a curse to the wife. Thus, failure to or inability to or refusal to effectuate sexual intercourse by the husband without any reason on the part of the wife, would amount to subjecting the wife to cruelty. Although the term 'cruelty' is not defined by the Act and to define the said expression is to limit its application which is not advisable inasmuch as it is not at all possible to comprehend the human conduct and behaviour for all time to come, it may safely be stated that any conduct of the husband which causes disgrace to the wife or subjects her to a course of annoyance and indignity amounts to legal cruelty. False accusation would also amount to cruelty as the same will lead to mental torture. See also *Krishna Rani v Channi Lal Gulati*, A I R 1981 P & H 119

Balbir Kaur v Dhir Dass, A I R 1979 P & H 162 —Cruelty is not confined to physical harm. Denial of medical treatment to the wife, on the day she arrived at the husband's house, turning her out that very day and later levelling false allegations against her father, etc., are circumstances which cumulatively considered show that the husband treated the wife with cruelty.

While determining what acts would cause mental agony as would be cruelty within the meaning of Sec 13(1)(a), the Court has to consider the status of the parties, customs and traditions by which they are governed and also public opinion which prevails in the locality.

Gopal Krishna Sarma v Dr Mithlesh Kumar Sharma, A I R 1979 All 316 —The husband being a helpless observer and witnessing the conduct of his mother towards his wife cannot amount to cruelty and no decree of divorce can be passed against him on that account.

Rajinder Singh Jogin v Smt Tara Wati, A I R, 1980 Delhi 218—Where a wife in Delhi, informed of the serious condition of her husband admitted to the military hospital in Assam after an accident, does not care to see him during his eight months' stay in Assam as also during his subsequent stay in the Delhi hospital, her conduct amounts to cruelty in its ordinary meaning and is one of indifference when she had been receiving allowance from her husband's salary and the Railway would issue free passes in such cases. In view of the wife's statement in the High Court that she does not want to oppose her husband's application for relief, the High Court granted a decree for divorce, the husband having also paid the sum demanded by the wife in lieu of dowry.

Shakuntala Kumari v Om Prakash Ghat, A I R 1981 Delhi 53—A normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. If this is not possible due to ill-health on the part of one of the spouses, it may or may not amount to cruelty depending on the circumstances of the case. But wilful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to mental cruelty, especially when the parties are young and newly married. Similarly, hysterical and psychological repulsion to sexual intercourse may not in every case amount to wilful denial of sex by one spouse to another.

Where the wife refused to continue her treatment for frigidity and refused to discharge her matrimonial obligations and also made false complaints to her husband's superior which would have the effect of bringing him down in the eyes of the superior, refusal of wife to fulfil her matrimonial obligations coupled with her making of complaints amounted to treating the husband with cruelty.

Sulochana v Ram Kumar Chauhan, A I R 1981 All 78—Where in a suit for dissolution of marriage the husband had not put forward cruelty as a ground upon which he sought relief against his wife but included it later in the replication he filed after the wife had alleged in her written statement that her husband was having adulterous relations with his sister-in-law, no relief on the ground of cruelty could be granted when the same was not put forward in the petition.

The requirement that the facts on which the claim to relief is founded shall be stated in every petition as distinctly as the nature of the case permits contained in section 20 and as prescribed by the Rules, is of an overriding nature which clearly rules out the grant of relief on the basis of allegations contained in the application.

Ibid Desertion Devi Singh v Sushila Devi, A I R 1980 Raj 48—If one spouse by his words or conduct compels the other spouse to leave the matrimonial home, the former would be guilty of desertion, though it is the latter who has physically separated from the other and has left the marital home.

It is clear from the *Explanation* to Sec 13 (1) that the burden is on the petitioner to show that the respondent has deserted him or her without his or her consent or against his or her wish.

Dr Srikanth Rangacharya Adya v Anuradha, A I R 1980 Karn 8—The *Explanation* to Sec 13 (1) (i-b) makes it clear that the wilful neglect by one of the parties to the marriage of

the other would amount to desertion. To constitute desertion within Sec 13 (1) (i-b) it is not necessary that one or the other parties should actually depart from the matrimonial home. If there is a complete abandonment of all matrimonial duties, desertion can be inferred. Desertion is not from a place but from a state of things.

Gagan Nath v. Krishna Kumari, 82 Panj L R 83—Where the wife had become a Brahma Kumari and declined to maintain matrimonial relations with the husband which amounted to cruelty and deserted him for more than 2 years immediately preceding the presentation of the petition for divorce on the ground of cruelty and desertion, the husband is entitled to the grant of a decree for divorce.

Balbir Kaur v. Dhir Dass, A I R 1979 P & H 162—Where the husband did not take any steps for maintaining the wife or for making arrangements for her to live with him or to undo the effect of cruelty meted out to her he would be deemed to have deserted her and the wife would be entitled to a decree of divorce under section 13 (1) (i-b). Though the husband took out a warrant under Section 97 of the Criminal Procedure Code and pursuant to that the wife was made to spend one or two nights in the husband's house that would not mean condonation of the earlier desertion by the husband.

Gurmet Singh v. Smt Ajit Kaur, (1979) Panj L R 122—If in fact there has been a separation between the spouses the essential question always is whether that act could be attributed to *animus deserendi*.

The offence of desertion commences when the factum of separation and *animus deserendi* co-exist although it is not necessary that they should commence at the same time.

Where in a petition by the husband for divorce the wife categorically stated that she was prepared to live with the petitioner and the latter stated "I am not prepared to take the respondent with me at any cost because she insulted me before my friends", it is evident that the petitioner's husband does not want to rehabilitate her at his house and hence he cannot be allowed to take advantage of his own wrong.

Ibid, "Non-resumption of cohabitation after judicial separation or decree for restitution etc." **Santosh Kumari v. Mohan Lal, A I R 1980 P & H 325**—Under section 13 (1-A) either of the parties including the defaulting party can seek divorce on the ground that there has been no resumption for one year or more after the passing of a decree for restitution of conjugal rights.

Bai Mani v. Jayantilal Dahyabhai, A I R 1979 Guj 209—The effect of the amended sub-section (1-A) of Section 13 of the Hindu Marriage Act is that it entitles even a defaulting party and not merely an aggrieved party to obtain a dissolution of a marriage by decree of divorce on satisfaction of the conditions prescribed therein. It also cannot be a bone of contention between the parties that either of the spouses is under any obligation to resume cohabitation after the decree for judicial separation or restitution of conjugal rights is granted.

Lad Kanwar v. Jagdish, A I R 1979 Raj. 177—Where in a suit by the husband for restitution of conjugal rights the wife's claim for judicial separation was decreed and had become final and later on the husband filed an application for divorce under Sec. 13 (1-A), it

could not be resisted on the ground that the earlier decree for judicial separation was passed without jurisdiction.

Leelawati v Ram Sewak, A I R 1979 All 285—The period of 1 year prescribed by section 13 (1-A) for filing a suit for dissolution of marriage should be deemed to commence from the date on which the decree for restitution of conjugal rights was passed and not from the date of the knowledge of the decree.

A decree for dissolution of marriage passed in a suit filed on failure of a spouse to comply with a decree for restitution of conjugal rights is not illegal only because the Court did not make any endeavour to be about a reconciliation between the spouses.

Sec 15 Scope **Jamboo Prasad Jain v Malti Prabha, A. I R 1979 All 269**—Sec 15 applies only to the case of dissolution of marriage by a decree of divorce. It does not apply to a decree passed for the annulment of a marriage under section 12. A decree of divorce stands on a different footing from a decree of nullity. In the former case it postulates valid and effective marriage which by reason of subsequent events had to be dissolved, the latter case postulates a voidable marriage which has been declared void.

Sec 15 proviso as amended in 1976 is retrospective and therefore has to be read as non-existing.

Sec 17 Applicability **Parameshwari Bai v Muthojirao Sandia, A I R 1981 Karn 40**—To attract the provisions of Sec 17, the marriage should have been solemnised after the commencement of the Act.

Sec. 19. Court to which petition should be made “Every petition under this Act”, **Damodar v Urmila, A I R 1980 Raj 57**—The words ‘every petition under this Act’ occurring in Sec 19 have reference to the petitions under Secs. 9 to 13 of the Act. The Act does not make any provision for the grant of relief to a spouse interested in getting a declaration that he or she, has already obtained dissolution of marriage according to custom or usage of the community panchayat and that the said dissolution is valid and binding on the two spouses. Similarly there is no provision in the Act, to enable a spouse, against whom a petition is filed by the other spouse, under any of the Ss 9 to 13, to raise a plea in defence that he or she has already obtained dissolution of the marriage from the community panchayat or the like according to custom governing the parties, and that, therefore, the marriage is no longer, subsisting. It must, therefore, be held that the Act which deals with certain matrimonial disputes among the Hindus does not make any provision for adjudication of a claim or defence, that the marriage between the contending parties already stands dissolved by virtue of the decision of a private forum like the panchayat of the tribe, community, group or family, as the case may be. Such adjudication can be obtained only from the Civil Court and not from the matrimonial Court under the Act.

Sec 23 General **Dr Srikanth Rangacharya Adya v Anuradha, A I R 1980 Karn 8**—The amended Sec 23 is applicable to proceedings pending on 27th May, 1976 and the respondent-wife can amend her pleading by seeking divorce on ground of cruelty and desertion and get the relief on proof of the grounds pleaded.

Jaswinder Kaur v Kulwant Singh, A I R 1980 P & H 220—The wife's plea in an application for dissolution of marriage by the husband on the ground of non-compliance with the decree for restitution of conjugal rights that the husband had refused to let her resume cohabitation would be no ground to disentitle the husband to the relief of dissolution of marriage.

Ibid [sub-section (1-a)] "Taking advantage of his own wrong" Santhosh Kumari v Mohanlal, A I R 1980 P & H 325—The question who is at fault is not to be gone into by the Courts. The word "wrong" or disability when read with Sec 13 (1-A) is a wrong or disability other than a mere disinclination to agree to an offer to resume in pursuance of a decree for restitution. That a decree for restitution can be executed symbolically under Order 21, rule 32, Civil Procedure Code, and that a spouse refuses to resume cohabitation in spite of an execution application filed by the other spouse, do not mean that the decree for restitution stands satisfied and the spouse refusing to resume cohabitation is not entitled to file an application for divorce.

Bai Mani v Jayantilal Dahyabhai, A I R 1979 Guj 209—The only pertinent question which arises is whether the continuance on the part of the husband in adulterous course of life by staying with his mistress would amount to such a wrong as to disentitle him to a decree of divorce under Sec 23 (1) (a) of the Hindu Marriage Act.

In order to constitute a 'wrong' within the meaning of Sec 23 (1) (a), the misconduct must be serious enough to justify denial of the relief to which the alleged wrong-doer is otherwise entitled. Where the respondent-husband had admitted in his evidence before the trial Court that he has connection with his mistress and has been residing with her for more than 11 years and that he has got three children through her, the matrimonial offence of adultery has exhausted itself when the decree for judicial separation was granted to the wife. It is precisely for that reason that the wife sought the decree for judicial separation. It is no doubt true that the husband is continuing to reside with his mistress. But can it be said from that fact that it is a new fact or circumstance subsequent to the decree of judicial separation which amounts to a wrong of such a nature as to disentitle her husband to the relief which he is claiming in the present suit. It is no doubt true that it is a continuous wrong. But, it cannot be said that it is a new fact or circumstance amounting to a wrong which will stand as an obstacle in the way of the husband to successfully obtain the relief which he claims. The only way in which Sec 13 (1-A) and Sec 23 (1) (a) can be reconciled is that there must be some facts or circumstances occurring after the decree for judicial separation, which would amount to such substantial wrong that in granting a decree for divorce to a defaulting party or a wrong-doer would amount in the circumstances to taking advantage of his own wrong. It cannot be said that he is taking advantage of his own wrong when he makes an application for divorce though continuously residing with his mistress after the judicial separation has been granted. As a matter of fact, he is trying to exercise his right granted under the amended provision of the Act.

There must be some facts or circumstances occurring after the decree for judicial separation which amounts to substantial wrong, that in granting a divorce to a defaulting party or a wrong-doer, would amount to the circumstances to giving advantage to his own wrong.

The matrimonial offence of adultery having exhausted itself when the decree for judicial separation was granted to the wife and that being precisely the reason that the wife sought the decree for judicial separation, the husband who is continuing to reside with his mistress, is no doubt, committing a continuous wrong. Therefore it cannot be said that it is a new

factor or circumstance amounting to a wrong which will be an obstacle in the way of the husband to successfully obtain the relief which he claims in the divorce proceedings. It cannot be said that he is taking advantage of his own wrong when he makes an application for divorce though continuously living with his mistress after the judicial separation has been granted.

Soundarammal v Sundara Mahalinga Nadar, (1980) 2 M L J 121 93 L W 186 — The provisions of the Hindu Marriage Act as amended indicate that the amendments effected under Central Acts XLIV of 1964 and LXVIII of 1976 resulted in providing further grounds for divorce and to reduce the period for securing divorce after a decree is passed for judicial separation or for restitution of conjugal rights. Even though repeated amendments were effected to the Act, Sec 23 (1) (a) of the Act has remained untouched and it was not considered necessary to delete or modify that section or even to provide for an exception respect of Sec 13 (1-A) of the Act. 'Wrong' under Sec 23 (1) (a) has to be comprehended from the circumstances of each case. Section 23, as framed, contemplates that it should be applicable only if instance mentioned therein exist and if the Court is satisfied that such instances exist, then alone relief cannot be granted under the other sections of the Act. Non-compliance of a decree for restitution of conjugal rights or failure to cohabit in the case of a decree for judicial separation, by itself will not be a 'wrong' within the meaning of Sec 23 (1) (a) of the Act. To construe that any 'wrong' made out must be the one which is subsequent to the earlier decree will go against the purport and scope of Sec 23 (1) (a) which is still retained in spite of amendments. Therefore even if the defaulting spouse is not enabled to file a petition for divorce, if the wrong is of a continuing nature, it cannot be held that, merely because it originated even earlier to the first petition and was pleaded in that petition it cannot be taken note of for finding out, whether such a conduct of a defaulting spouse is reprehensible enough to constitute a 'wrong' on the date of the presentation of the petition by him for divorce. The limited extent to which relief can be granted, is to hold that the failure to comply with the decree for restitution of conjugal rights and judicial separation, would not constitute a 'wrong', and therefore, such a defaulting spouse can also sue for divorce and nothing more. If the defaulting spouse, as in this case, persists in doing the same wrong, which had formed the ground for the earlier petition filed against him Sec 23 (1) (a) will definitely prevent him from seeking relief for divorce. If it can be shown that the person seeking relief under Sec 13 (1-A) has committed any further wrong apart from what has been pleaded in the earlier petition, or the wrong already committed is of a continuing nature, and such conduct is serious enough to justify the other party from complying with the decree that has been passed, the amendments effected to the Act do not enable such defaulting spouse to secure a decree for divorce.

Ibid [sub-section (1) (d)] Unreasonable delay Pavunambal v Ramaswamy, (1979) 2 M L J 273 — Section 23 (1) (d) interms just did not refer to delay merely, what is cautioned against was "unnecessary" or improper delay. The former adjective might possibly have reference to the circumstances which in given cases might or might not amount to extenuating circumstances for the delay. The epithet "improper" would indicate that the Court has to see if the delay has in any material way rendered it difficult for the Court to come to a reasonably satisfactory determination on the issue raised in the proceedings.

Where the marriage was in 1957 and the Court was moved in 1974 to have it declared a nullity on the ground of the husband being already married and having a wife, and by then the

husband had died and the first wife also had died in 1958 and the lower Court on the evidence found the marriage to be bigamous but that the delay in moving the Court for relief was fatal to holding the dismissal to be improper the High Court observed that the element of delay could not override other considerations, that in any case the time lag in instituting the proceedings could by no means be over-emphasised but must be considered in the proper setting and in the context of various other statutory considerations, the relative importance, the cumulative effect of which the Court had to decide for itself in a reasonable and just fashion

Atmaram v Narbada Devi, A I R 1980 Raj 35—Delay of 6½ years after the spouses separated in filing application for restitution of conjugal rights is not fatal to the application where it was shown that incessant efforts were made for an amicable settlement all the time before filing the petition

Ibid [sub-section (2)] Duty of Court before proceeding to grant relief Leelawati v Ram Sewak, A I R 1979 All 285—Section 23 (2) is not absolute A discretion is left to the Court notwithstanding the imposing of a duty on the Court to make every endeavour to bring about a reconciliation between the parties

Jaswinder Kaur v Kulwant Singh, A I R 1980 P & H 220—In a divorce case it is not incumbent on the matrimonial Court to allow the trial to proceed towards finality and make efforts for reconciliation between the parties only at the stage short of pronouncement of judgment The timing of the effort will have to vary from case to case Having to grant reliefs in sensitive fields the matrimonial Court can choose with or without suggestion from counsel or parties the time at which reconciliation wherever possible and whenever consistently with the nature and circumstances of the case is practical to be attempted

The Court's attempt in the instant case where divorce was sought by the husband on the ground of non-compliance by the wife of a decree for restitution, to bring about reconciliation at the stage prior to the striking of issues was held not to contravene Sec 23 (2)

Ram Kumar v Kamala Datta, A I R 1981 J & K 9—The Court's duty to try first for reconciliation between the parties is not justifiable without directing the respondent to file his objections

Sec 24 Scope Puran Chand v Kamala Devi, A I R 1981 J & K 5—Under section 24 maintenance can be granted during the proceeding in favour of the husband or wife as the case may be but not in favour of a child born out of the wedlock of the parties

The words "during the proceedings" connote the period from the commencement to the conclusion of the proceedings, that is, in the trial Court from the date on which the issues are framed ordinarily known as the first hearing till the date of disposal of the case. Therefore interim maintenance cannot be granted from the date of filing of the proceeding

Amrik Singh v Narinder Kaur, A I R 1979 P & H 211—Order passed on an application for maintenance and litigation expenses will be valid even if it was passed after the decision on the main petition

Yogeshwar Prasad v Jyoti Rani, A I R 1981 Delhi 99—The expression 'any proceedings under this Act' appearing in Sec 24 covers the proceedings under Sec 25 thereof Section

25 contemplates that an order for permanent alimony can be made at the time of the passing of any decree under the Act or any time thereafter. Now, if a spouse has to make an application after any decree under the Act has been passed and has no sufficient means of his/her own, such spouse has to be provided for prosecuting the application for permanent alimony when the other spouse opposes any grant thereof. Any other construction will be narrow and will lead to frustration of the provisions. Section 25 is a continuation of the main proceedings. Placement or numbering of the sections or the description of one set of documents as petitions and the other set as applications does not alter this position. The purpose of using the words 'husband' or 'wife' is to identify the position occupied by the parties in the main proceedings, and not to exclude ex-spouses.

Ibid Court's approach *Gangu Pundlik Waghmare v Pundlik Maroti Waghmare*, A I R 1979 Bom 264—To refuse claim of maintenance *pendente lite* and litigation expenses applied for by the wife in divorce proceedings against her on a plea that she is guilty of a matrimonial offence would amount to pre-judging the main issue and is also contrary to the object of section 24.

The comma occurring after the words "the expenses of proceeding" in section 24 is not disjunctive and does not denote the legislative intent that the husband must pay the expenses of the proceedings even if he is not possessed of means.

Jiwan Lata v Krishnan Kumar, (1979) 81 Punj L R 426—A wife found living a nunchaste life is not entitled to the grant of maintenance *pendente lite* and litigation expenses.

But see *Yogeshwar Prasad v Jyoti Rani*, A I R 1981 Delhi 99.

Ibid "Independent income" *Gurmail Singh v Bhuchari*, A I R 1980 P & H 120—The words "independent income" refer to the time when the application for maintenance is made and not to the time when it is granted.

The fact that a person is working on his father's or any other relation's farm or any other kind of establishment does not mean that he is not to pay maintenance *pendente lite* on the ground that he has no independent income of his own. It cannot be said that such a person is having no income of his own within the meaning of section 24.

Joshi v Ganga Devi, A I R 1980 All 130—The fact that the wife can go and live with her parents is no bar to her claim for maintenance against her husband. What is relevant is whether she has any income of her own.

Sec 25 Scope *Darshan Singh v Mst Daso*, A I R 1980 Raj 102—The expression "passing any decree" in Sec 25 means passing a decree granting relief of the nature stated in Secs 9 to 13. So when the husband's petition for restitution of conjugal rights is dismissed, award of maintenance under section 25 will be without jurisdiction.

Section 27, *Surinder Kaur v Madan Gopal Singh*, A I R 1980 P & H 334—The principles underlying section 27 are: (1) The proceeding must be a matrimonial proceeding pending under the Act and an application for the disposal of property must be made before this decision in the proceeding. (2) It is not incumbent on the Court to make provision in the decree with regard to the disposal of property and it is left to judicial discretion. (3) The provision

so made should be just and proper having regard to the adjustments of the parties and considering all material circumstances (4) The order should cover only that property which was presented at or about the time of marriage i.e., presented at the marriage as well as prior to or after the time of marriage in close proximity thereto (5) The property so presented may belong to the wife or the husband or both (6) At the time the Court has to exercise discretion the property may belong jointly to both the spouses

The term 'belong' does not affect title to the property in the sense of ownership. It only connotes connection with the property

Section 27 provides for the sharing of the property which the spouses received individually or collectively as presents at or about the time of marriage and came to be used by them in their day to day living and thus belonging to them for the purpose

Santosh Anand v Anand Prakash, 1980 A W C 157—Where in a petition for divorce the wife's case was that the goods in question belonged to her alone and had wrongfully been detained by her husband, the claim for the return of the goods would be beyond the scope of the proceedings under section 13 read with section 27 as an order under section 27 can be made only in respect of property "presented at or about the time of marriage which may belong jointly to both husband and wife

Section 28 Scope Darshan Singh v Mst. Daso, A I R 1980 Raj 102—The expression 'decree made' in section 28 means decree granting or refusing relief. An appeal by the husband against an order dismissing a petition under section 9 is maintainable under section 28

Rajpal v Dharmavathi, A. I R 1980 All 350 [see also **Ram Narayan Pathak v. Urmila Devi, A I R 1980 All 344**]—An appeal being a creature of statute and there being no provision in section 28 in that behalf in respect of an order under section 24, such an appeal would be incompetent

Mohinder Kaar v Bikkar Singh, A I R 1979 P & H 248—In an appeal by the wife from a decree of nullity under section 12, a claim by the respondent for a decree of divorce on the ground of the appellant's suffering from venereal disease could not be allowed to be raised for the first time

Ibid Limitation Dabi Bahadur v Kumarjib Bahadur, A I R 1980 Cal 1 (F. B.)—The law of limitation being a procedural law, whenever amended should be retrospective in operation unless there is any strong reason to the contrary. In the Marriage Laws (Amendment) Act, 1976, however, there is an express provision in this behalf in section 39 (1) which amended the Act

Vol II THE HINDU MINORITY AND GUARDIANSHIP ACT

Section 6 General Dr Snehalata Mathur v Mahendra Narain, A I R 1980 Raj. 64—In view of section 6 the father as the natural guardian does not require his appointment as guardian of his minor child

Sudaramoorthy v Shanmuga Nadar, (1980) 1 M L J. 486—When the father is alive he is the only person who can deal with the properties of a minor from whichever source the minor gets the properties. A *defacto* guardian has no place

Ibid, Custody of the person of a minor Premila Devi v. Jayachandran, (1981) 1 M. L. J. 497—The custody of the child which is below the age of 5 may be formally given to the mother But if the custody of such child is with the father it will not be illegal

The custody of the tender child to be with the mother is only a preferential claim and the fact that it is with the father cannot make such custody illegal

As per law the father is the natural guardian Technically the custody has to be with the mother if the child is below 5 years of age In the absence of any extraordinary circumstances to warrant resort to Article 226 of the Constitution the relative merits of the claim to custody have to be discussed and decided after hearing the evidence let in by the respective parties This can be effectively done before the civil Court constituted under the Hindu Minority and Guardianship Act and the Guardians and Wards Act

See 8 Powers of natural guardian Manik Chand v. Ramachandra, (1980) 4 S C C. 22 A. I R 1981 S C 512—After the passing of Hindu Minority and Guardianship Act, 1956, the guardian of a Hindu minor has power to do all acts which are necessary or reasonable and proper for the benefit of the minor or for realisation, protection or benefit of the minor's estate This provision makes it clear that the guardian is entitled to act so as to bind the minor if it is necessary or reasonable and proper for the benefit of the minor The power thus conferred by the section is in no way restricted than what was recognised under Hindu Law This applies even to a contract for purchase of immovable property As it is within the competence of the guardian, the contract is entered into effectively on behalf of the minor and the liability to pay the money is the liability of the minor under the Transfer of Property Act It cannot be said that by a contract for purchase of property, the guardian would be binding the minor by his personal covenant Thus the contract entered into by the guardian on behalf of the minor is enforceable (1912) 9 All L J 33 (P C), Not followed

Ibid Personal Covenant Darbara Singh v. Karminder Singh, A I R 1979 P & H 215—Section 8 (1) makes it clear in unqualified terms that no personal covenant of the guardian shall be binding on the minor Though the interdiction is by way of a proviso at the far end of section 8 (1) a guardian though well within his right to enter into a contract for the benefit of a minor the said contract would not be enforceable against the minor even when it was entered into for his benefit and would be voidable at his instance

Manik Chand v. Ramachandra, A. I R. 1981 S C 519—Payment for the purchase is not a personal covenant and therefore, not excluded under section 8 (1)—Liability to pay the purchase price is a liability of minors under the Transfer of Property Act 1882 The contract is hence enforceable I L R. 18 Mad 415 5 M L J 164 I L R (1949) 1 Mad 141. A I R 1948 P C 95 75 I A 115, (1856) 6 Moo 1 A 393 18 W R 81 2 Suth 29 30 I A 114 30 Cal 539 and A I R 1956 Andh 33 1955 An W R 818, approved I L R 39 Cal 232, not followed

Sanwal Das v. Amar Nath Shastri, (1980) 6 A L R 164—Where a sale deed was executed by a guardian of minor's property without permission of Court and the minor had received the benefit of the consideration and the minor avoided the sale and got the deed cancelled, the latter is bound to return the consideration amount

Sec 11 De facto guardian *Pattay v Subbaraya*, (1980) 2 M L J 299 —While sections 6, 9 and 12 take care to exclude the undivided interest of a minor in the joint family properties from the scope of the property guardian, viz, the father of the minor, section 11 does not contain any such restriction, the provision in section 11 will therefore apply equally to both kinds of properties, separate as well as undivided

The management of the adult members of the family referred to in Sec 12 contemplates only the case of a male member of the family being in management. Recognition of the mother as an adult member of the family for the purpose of Sec 12 would not clothe her with powers to bind the interest of a minor by alienating the undivided interest of the minor. Any such alienation will be hit by section 11, because *vis-a-vis* the minor's undivided interest in joint family property she will be in the position of a *de facto* guardian

Sec 13. Appointment of guardian *Dr Snehlata Mathur v. Mahendra Narain*, A I R 1980 Raj 64 —In view of section 13, the consideration that the father is not unfit to be the guardian of his minor child may have to be cast aside in a case demanding the formal appointment of a guardian for the betterment and welfare of the minor

The application by a father under section 10 of the Guardians and Wards Act for appointment as guardian of his minor child aged 4 years on the ground of the minor's mother removing the child from his custody and leaving her with her own parents and going abroad is in fact, in the circumstances of the case an application under section 25 of that Act for custody of the minor

Where the contest is between the father and some person other than the mother the position of the father from the point of view of the minor's welfare, is clearly preferential. It is open to the challenger however to satisfy the Court that the welfare of the minor lies in keeping him away from the custody of the father. The onus on such person will be very heavy, for the Court will require very strong reasons to interfere with the father's right to custody. In the circumstances of the case, the father must be given the enhance in the absence of the mother

VOL II THE HINDU ADOPTIONS AND MAINTENANCE ACT

Sec 11 Disparity in age between adopter and adoptee *Golak Chandra Rath v Krtibas Rath*, A I R 1979 Orissa 205 —A violation of the condition that there should be an age gap of 21 years between the adopter and the adoptee in case the adopter is a female and the adoptee a male will render the adoption void

Adoption by female aged 20 years of a boy of 5 years is invalid

Sec 12 Effect of adoption *Khazan Singh v Union of India*, A I R 1980 Delhi 60 —Section 12 postulates that the adopted child is deemed to be the child of the adoptive father for all purposes and all the ties of the child in the natural family shall be deemed to be severed and replaced by those of the adoptive family. The emphatic repetition of the word "all" in relation to the "purposes" and "ties" is significant. The word "ties" is a very wide and comprehensive word and would include all types of bonds, social, religious, cultural or any other that bound the adoptee in the natural family. In view of this the adoptee is to be treated from the date of the adoption as if he were born in the adoptive family for all practical purposes. Therefore on adoption as in the case of a birth, the adoptee acquires the caste of his adoptive parents without anything more to be done by him or others. The adoptee does not require the sanction of the adoptive community for treating him as a member thereof

A scheduled caste certificate granted to the adoptee accepting the adoption as the basis is proper and cannot be cancelled without giving an opportunity to the adoptee to prove that the adoption was valid

Nalavada v Ananda, A I R. 1981 Bom 109—Section 12 consists of two parts. The second part specifically deals with the ties forged and snapped on adoption and their effect on the rights in the property acquired during the subsistence of such ties. Both the parts of section 12 are aimed at abolishing the much maligned doctrine of 'relation back' by reference to its retrospective effect on the rights in the property. Though, both the parts make adoption effective from the date of adoption raising fictions to that effect, mechanism resorted to, to achieve the same objective, is different in the one from the other. The fiction raised in the first part is to be effective 'for all purposes' from the date of adoption. This prevents the adoption in the joint family from having any retrospective effect on its property. Under the rule of survivorship, a member gets interest in the property on his birth or adoption. The section prevents the rule of survivorship from having any effect before the date of adoption and prevents the adopted son from reopening the partition effected after the death of his adoptive father and consequently reaching the property in the hands of the divided members or their heirs. The second part takes notice of the inevitable retrospective effect of the severance and replacement of the 'ties' on adoption and consequential divesting of the adopted son and others of the properties inherited as the nearest available heir during the subsistence of the pre-adoption ties, consistent with the fiction of his being born in the adoptive family. While devolution of the property on the member of the joint family entering therein by birth or adoption, under the rule of survivorship becomes effective only on partition, the succession to the same under rule of inheritance by the nearest available heir becomes effective immediately on the death of the holder, when succession opens. Second part however, makes such divesting ineffective firstly by eliminating all pervasive 'for all purposes' fiction of the first part from this part, and secondly by making the post-adoption ties effective from the date of adoption, and thirdly, by engrafting an exception to ordinary retrospective effect of severance and replacement of 'ties' by enacting clauses (b) and (c) in the proviso and expressly preventing the divesting of the child and other persons of the properties inherited by them as nearest heir during the subsistence of the pre-adoption ties. Merely making adoption effective from the date of adoption could not have had this effect.

Kesharbai v State of Maharashtra, A I R 1981 Bom 115 (F B)—The adopted child is to be deemed to be the child of his or her adoptive father or mother for 'all purposes' with effect from the date of adoption. This declaration is thus conditioned by the fact that its operation takes place from the date of the actual adoption and there is no relation back to the death of the father to whom the mother made the adoption. Under the traditional Hindu Law if the adoptive father has only self-acquired property, the adopted son will not get any interest in the property of the father because of the adoption for the same reason that the natural son of such a father also had no interest, by virtue of the self-acquired nature of the property of his father. The existence of the joint Hindu family property is, therefore, *stare quo non* for a son to get a right by birth whether he is a natural born son or adopted son.

Ibid No divestiture on adoption Banabai v Wasudeo, A I R 1979 Bom 181—Adoption takes effect only from the date of adoption and does not relate back to the date of the death of the adoptive father. Sec 12 proviso (c) makes it clear that the adopted son, short of acquiring the right of management and right to property of his adoptive parents, acquires all other rights and status of natural born son in the family of adoption.

Sec 13 Scope *Banabai v Wasudeo*, A I R 1979 Bom. 181 —Section 13 speaks only of an agreement by which the power of the father can be exercised in a particular manner. If the property had already vested the right or power is not touched by the adoption and can only be subjected to such terms as an agreement can impose.

Where an adoption deed executed by a widow in 1959 (her husband having died in 1958) stated that the adopted son had all the rights of a natural son, that he should reside with the widow and look after her in her old age and that he had acquired the same ownership rights like a natural son over all her movable and immovable properties, the recitals did not spell out an ante-adoption agreement, they merely recited the position which upon adoption the adoptee acquired with reference to the adoptive family, that the adopted son would acquire the rights of a natural born son only from the date of adoption, that this was not inconsistent with the widow not divesting herself of her rights, that the transfer of her rights could only be by a registered deed of conveyance and not by the adoption deed.

Sec 16 Presumption as to registered documents relating to adoption *Golak Chandra Rath v Krutibas Rath*, A I. R 1979 Orissa 205 —The rule of presumption in section 16 is that where there is a duly registered document in support of adoption the Court shall presume that the adoption was in accordance with the provisions of the Act unless and until it is disproved. Consequently the proponent of the adoption need not prove the same as in the ordinary way where there is no document satisfying the requirements of section 16.

Indrawati v Jagmal, 81 Punj L. R 505 —In view of section 30, section 16 cannot be resorted to and the onus of proof of adoption made before the coming into force of the Act lies on the person alleging the adoption though there was a recital of the adoption in a deed executed in 1962.

Sec 18 Scope of the section *Shanti Saroop v Usha Devi*, 1979 K L J 149 —The mere fact that the Act does not contain any provision for the grant of any interim relief during the pendency of proceedings under sections 18 and 20 cannot take away the inherent powers of the Court under section 151, Civil Procedure Code. It is within the inherent jurisdiction of the Court to make an order which tends to promote the ends of justice and in the absence of a specific provision in a given statute for interim relief, resort to section 151 Civil Procedure Code, is permissible for award of such relief.

Sec 22 Scope of the section *Appala Lakshmi Narasamba v Sundaramma*, (1981) 1 An W R 71 (F B) —Sections 21 and 22 are prospective in operation and the right to maintenance out of the estate of a deceased Hindu vested on his death before the commencement of the Act under the Hindu law in force at the time of his death is not destroyed or affected in any manner whatsoever.

Section 22 (1) states that the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased. The word 'heirs' includes donees and devisees and that is the view taken by several High Courts. Whoever gets the estate of the deceased or a part of it must in proportion get along with it a corresponding obligation or burden of maintaining the dependants of the deceased.

Jag Mohan v. Jiana, 1979 A W C 695 —The widow of a deceased son cannot be a 'dependant' of her husband's brothers who are only liable to maintain her as the heir of their father to the extent of the estate inherited by them from him. She is only a dependant of her father-in-law.

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CHAPTER XVI

LAW OF IMPARTIBLE ESTATES

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627 Creation of impartible estate	SUCCESSION TO IMPARTIBLE ESTATE
628 Impartible estate whether can be joint family property	633 Rule of succession
629 Burden of proof of impartibility	634 Ordinary and lineal primogeniture
630 An impartible estate when separate property of its holder	635 Operation of the rule of primogeniture among sons
631 Incidents of impartible estate	636 Whole blood and half blood
632 Ancestral impartible estate when ceases to be joint	637 Position of females
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627 Creation of impartible estates - An impartible estate might have been created by grant, by custom or by family arrangement. It is, however, essentially a creature of custom.¹ The power to create an impartible estate by a grant is the prerogative of the Sovereign and a subject has no such power.² As regards custom creating impartibility, it must be ancient and invariable and must be established to be so by clear and unimpeachable evidence.³ An impartible estate might also have had its origin in a family arrangement followed up in practice for many generations whereby it was agreed that the family property should be held by a single person at a time in a certain order of succession, the other members being entitled only to maintenance.⁴ The onus of proving that an estate is impartible is upon the person pleading it.⁵

628 Impartible estate whether can be joint family property - The mere fact that a property is impartible does not make it the separate or the self-acquired property of the holder. It may be his separate property⁶ or it may be the property of a joint undivided family of which he is a member.⁷ If it is the latter, succession to it will be regulated according to the rule of survivorship, although according to the custom of impartibility the person designated will hold the raj without the others sharing it.⁸ Impartibility is essentially a

(1) *CIT v Sivarama Prasad*, 1 I.R. (1970) A.P. 197.

(2) *Rajendra v. Raghunath*, 40 A. 470, 45 I.A. 134, 20 Bom. L.R. 1075, 23 C.W.N. 101, 9 L.W. 570, 1918 M.W.N. 831, 1918 P.C. 25. An estate can also be made impartible by statute which has been done in Madras See Madras Impartible Estates Act of 1904.

(3) *Martand Rao v. Madhav Rao*, 55 C. 403, 55 I.A. 45, 30 Bom. L.R. 251, 54 M.L.J. 397, 27 L.W. 350, 32 G.W.N. 621, 1928 M.W.N. 942, 1-28 P.C. 10.

(4) *Rao Kishore v. Mst. Gahanabai*, 53 I.C. 630, 12 L.W. 730, 7 A.I.J. 1077, 22 Bom. I.R. 507, 24 C.W.N. 601, 37 M.L.J. 507, 37 M.L.J. 562, 1920 M.W.N. 82, 1919 P.C. 100.

(5) *Metangas Zamindar v. Satrucharya Ramabhadra Rao*, 14 M. 237, 18 I.A. 45, *Bapua v. Krishappa*, 37 Bom. L.R. 599, 1935 B. 380, *Manohar Singh v. Mt. Sidhan*, 68 M.L.J. 448 (P.C.), *Martand Rao v. Madhav Rao* *supra*.

(6) *Periasami v. Periasami*, 1 M. 312, 6 I.A. 61.

(7) *Doorga Persad v. Doorga Kanuwar*, 4 C. 190, 5 I.A. 149.

(8) *Bajinath Prasad v. Tej Bah*, 43 A. 228, 48 I.A. 195, 19 A.L.J. 317, 23 Bom. I.R. 654, 25 C.W.N. 564, 40 M.L.J. 387, 1921 M.W.N. 300, 2 P.L.T. 257, 1921 P.C. 62.

creature of custom. In the case of ordinary joint family property, the members of the family have (i) the right of partition, (ii) the right to restrain alienations by the head of the family except for necessity, (iii) the right of maintenance and (iv) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in *Sartaj Kuar v. Deoraj Kuar*⁹ and in *Venkata Surna v. Court of Wards*¹⁰ and so also the third as held in *Raja of Pittapur v. Rama Rao*¹¹. The junior members of a joint family in the case of an impartible estate took no right to property by birth and have no right to partition¹². The junior members had no right to interdict alienations by the head of the family either of necessity or otherwise. This was subject to Section 1 of the Madras Impartible Estates Act in the case of estates governed by the Act¹³. The right of the junior members of the family for maintenance was governed by custom and was not due to any joint right or interest in the property¹⁴. The income of the impartible estate was the individual income of the holder of the estate and was not the income of the joint family¹⁵. To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral is clothed with the incidents of self-acquired and separate property¹⁶. The only vestige of the incidents of joint family property which still stuck to the impartible estate was the right of survivorship which was not inconsistent with the custom of impartibility¹⁷. This right, therefore, remained and this was what was held in *Baynath Pershad v. Tej Bai*¹⁸. To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law is applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains¹⁹. Nor is this right, a mere *specie successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surren-

(9) 15 I A 51 10 A 272

(10) 16 IA 83 27 M. 383 3 CWN 415 9 MLJ (Supp.) 11 Bom LR 277

(11) 45 IA 148 11 M 778 16 ALJ 833 26 Bom LR 1056 23 CWN 173 35 MLJ 392 1918 MWN 922 1918 PC 81. That the right to maintenance is, however, not inconsistent with the incident of impartibility has been observed in the later case of *Collector of Gorakhpur v. Ram Sundar*, 45 A 488 61 IA 286 and has been expressly decided by the Madras High Court in *Maharaja of Venkatagiri v. Rajeswara*, 49 LW 717 But see S 631

(12) *Kumara Krishna v. Sartagna Kumara Krishna*, 1970 SC 1795, C.I.T. v. *Sivarama Prasad*, 1970 AP 197

(13) *Ibid*

(14) *Ibid*

(15) *Ibid*

(16) *Ibid*

(17) *Ibid*

(18) 48 IA 195 43 A 228 19 ALJ 317 23 Bom LR 654 25 CWN 564 40 MLJ 387 1921 MWN 300 2 PLT 357 1921 P.C. 62. See also *Krishnappa Rao v. Rajah of Pittapur*, 57 M 1 60 IA 336 65 11 LJ 479 1932 PC 202, 1933 ALJ 1039 1933 MWN 1191 38 LW 409 38 CWN 1 35 Bom LR 1076 15 PLT 1

(19) *Kumara Krishna v. Sartagna Kumara Krishna*, *supra*, C.I.T. v. *Sivarama Prasad*, *supra*.

(20) *Shib Prasad Singh v. Ram Prayag Kumari Devi*, 36 LW 266 59 C 1309 59 IA 331 1932 PC 216 34 Bom LR 1567 36 CWN 1046 1932 MWN 993; 68 MLJ 196 1932 ALJ 919 *Chunni Lal v. Jai Gopal*

629 Burden of proof of impartibility.—The following propositions of law were laid down by the Privy Council as well settled in *Martand Rao v Malhar Rao*,²¹ regarding proof of impartibility

“(a) When there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance, according to which custom the estate is to be held by a single member, and as such not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom

(b) Any such special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence. To use the words of Lord Justice James in the case of *Umritsnath Chowdhury v Gowdeenath Chowdhury*,²² the custom must be proved by something like what we should call in this country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back

(c) If an impartible estate existed as such from before the advent of the British Rule any settlement or regrant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom.”

Though it is possible that a divisible estate may remain undivided for a long time²³ the circumstance that a zamindari had been held entire for a very long period would seem to indicate that the ordinary rules of succession had not been applied to it and gives great countenance to the supposition that a custom of indivisibility existed in respect of the estate.²⁴ Impartibility being essentially a creature of custom, in modern times it is not open to the members of an ordinary Hindu joint family to establish themselves as a joint family with an impartible estate descending according to the rule of primogeniture, with rights of maintenance and other privileges to the junior members.²⁵ When impartible estate is acquired by the Government after giving compensation to the holder the compensation attracts the incident of impartibility *Ranga Rao v State of Madras*,²⁷ *Gopalakrishna v Sarvagna*.²⁸

17 Lab 378 1936 L 55, *Sellappa v Supan*, 1 L R (1937) M 906 1937 M 496 45 L W 340 (1937) 1 M.L.J. 422 1937 M.W.N. 125

(21) 55 C 403 55 IA 45 30 Bom L R 251 54 M L J 397. 27 L W 350 32 C W N 621 1928 M.W.N 942 1928 P.C. 10

(22) 13 M I A 542

(23) See also *Ram Nundun Singh v Janki Kori*, 29 C 828 29 IA. 178 4 Bom. L.R. 664 7 C.W.N. 57 (P.C.). See also *Narasimha Appa Rao v Narayana*, 2 M. 128-7 IA 31; *Hargovind v Collector of Etah*, 1 L R (1937) A. 292 1937 A.L.J. 610 1937 A 377

(24) *Thakur Dattao v Thakur Dori*, 1 I.A. 1, *Thakur Nita Pal v. Thakur Jas Pal*, 19 A 1 23 IA 147

(25) *Raja Deedar Hossein v Rave Zulfoor*, 2 M I A 441, *Thakur Nita Pal v Thakur Jas Pal*, supra.

(26) *Palani Ammal v Muthukentachala*, 48 M 254 52 IA 83 48 M L J 83 6 P L T 133 21 L W 439 1925 M.W.N 380 27 Bom L.R. 735 21 A L J. 746 29 C.W.N. 846. 1925 P.C. 49

(27) 1953 M 183.

(28) 1955 Andh. 204.

630 An impartible estate when separate property of its holder—“When an impartible zamindari has been acquired by the last holder or his branch as a self-acquisition, the other undivided members of his family take no interest in it and it descends as the separate property of the acquirer. That was what happened in *Katama Nachiar v. Raja of Shivaganga*”²⁹ On the other hand, it is also well settled that as regards an impartible estate which was or had to be considered joint family property, a member of the joint family might become separate with regard to it so as to lose his right to succeed to it by survivorship. That is what happened in *Periasami v. Periasami*³⁰ where a member of the joint family, believing himself to be next in succession to the larger Zamindari of Shivaganga, joined in a settlement under which he was held to have renounced all claims to the lesser Zamindari. Or, again, an impartible Zamindari might by consent be settled on a particular branch of the family as their separate property as in *Ranganayakamma v. Ramaiya*”³¹ Besides, when the holder of an ancestral impartible estate gives it absolutely to his younger son, the son takes it as his separate property as regards his brothers so that on the death of the donee without leaving male issue, his widow succeeds to the estate to the exclusion of his brothers.³² But if the donee happens to be his only son who in any event will get the estate by inheritance even if the father had left no will, the character of the estate as an ancestral impartible estate is not taken away. See section 632. But where an ancestral impartible estate is purchased by the Government for arrears of revenue, but is subsequently restored by the Government to the owner of the estate the estate reverts to its original status as a joint ancestral estate, impressed with all the incidents of such an estate.³³

631 Incidents of impartible Estate See also under section 628

(1) *Primogeniture*—It descends to a single heir and is held by only one person at a time, primogeniture being the rule of succession.³⁴

(2) *Alienation*—As a general rule, the impartible estate is alienable by will as well as *inter vivos*. But this general rule may be displaced by proof of a custom or a statutory enactment, as in the Madras Presidency, to the contrary. The onus of establishing this custom rests on the person who alleges it and such custom is not established by mere proof of the absence of alienations in the past.³⁵

(29) 9 MIA 579

(30) 1 M 312 JIA 61

(31) 5 CLR 439, *Kannammal v. Annadana*, 51 M 189 55 IA 114 1928 PC 63 [54 MLJ 504 26 LW 1929 1929 MWN 252 30 Bom LR 802 9 PLT 347 26 ALJ 642 32 CWN 983. See this question considered in *Chinnathay v. Kulasekara*, 59 LW 115

(32) *Ulagulam Perumal v. Subbalakshmi*, 44 LW 178 71 MLJ 1 1936 M 721 Affirmed by the Privy Council in 42 LW 621 43 CWN 594 66 IA 134 1 LR (1939) M 443 1939 MWN 576 51 Bom LR 718 (1939) 1 MLJ 812 1939 PC 95

(33) *Hargovind v. Collector of Euah*, 1 LR (1937) A 292 1937 A 377. See also *Chattar v. Roshan*, 1946 Nag 277

(34) *Ramalakshmi v. Sivanantha*, 1A Supp 1

(35) *Pratap Chandra v. Raja Jagadish Chandra*, 54 C 955 54 IA 289 53 MLJ 30 25 ALJ 628 29 Bom LR 1136 31 CWN 943 1927 MWN 513 8 PLT 623 27 LW 119, 1927 PC 159, *Udaya Aditya v. Jadhav Lal*, 8 C 199 8 IA 248, *Ka's Prasanna v. Nagendra*, 44 CWN 873, *Sham Pratap v. Basmi*, 1940 A. 353, *Bhimsingh v. Gangaram*, 1 LR (1941) Nag 632 1940 Nag 278, *Chattar v. Roshan*, 1946 Nag 277

NOTE—In *Sartaj Kaur v. Doray Kaur*³⁸, on appeal from Allahabad, the question was as to the validity of a gift *inter vivos* of part of an impartible estate made by the owner for the time being in favour of his younger wife. The Privy Council held that the gift in question was valid on the ground that the title to prevent alienation rests upon the present co-ownership of the person who wishes to retain it, and that in the case of an impartible estate such present co-ownership does not exist inasmuch as it is so connected with the right to partition that where that right does not exist present co-ownership falls with it. This case was decided in 1888. The next case was the Pithapur case, *Vinkata Srida v. Court of Wards*,³⁹ decided in the year 1899, when the question was whether the Raj was alienable by will. The judgment of the Board decided two points (1) that the *Sartaj Kaur's* cases³⁸ covered by analogy the case of alienation by will, and (2) that the law laid down thereby applied in Madras and was not confined to the North-West Provinces in which the case arose. The Board, therefore, not only followed their previous decision, but extended it so as to make it apply to alienations by will as well as to alienations *inter vivos*.⁴⁰

Maintenance—The junior members of the family are not entitled to maintenance from an impartible estate unless such a right is established either by custom or relationship or in any other way.⁴¹ Even where there is a custom under which a junior member is entitled to claim maintenance from the holder of the estate, the right is a personal one and hence not capable of being attached or alienated.⁴² The question whether the mere fact that a person happens to be a member of the joint family to which an ancestral impartible estate belongs entitled him apart from custom to claim maintenance out of that estate from its holder, has now been answered in the negative by the Privy Council. In *Chundrakunjerba v. Randhir Singh*⁴³ it is held that a successor to an impartible estate though takes by right of primogeniture in respect of an ancestral estate, was under a legal obligation to maintain the widow of the last holder of that estate irrespective of the question whether the latter had left his separate property to his widow or heir.

NOTE—The right of sons of the present and previous holders to maintenance in ancestral impartible estate has been so often recognised that it would not be necessary to prove a custom in every case.⁴⁴ Sons include illegitimate sons of exclusively kept concubine of a previous holder from whom the present holder has inherited the estate.⁴⁵ But there is no invariable or certain custom that any below the first generation from such holders

(3) 10 A 272 15 IA 61

(37) 22 M 383 26 IA 83 3 CWN 415 9 M L J (Supp.) 1 1 Bom L R 277

(38) See foot note 36

(39) *Pratap Chandra Das v. Jagadish Chandra*, 54 C 955 54 IA 289 53 M L J 301 25 A L J 628 29 Bom L R 1136 31 CWN 943 1927 MWN 513 8 P L T 623 27 L W 119 1927 P C 159, *Shib Prasad Singh v. Rani Payag Kumari*, 59 C 1399 36 L W 266 59 IA 331 1332 P C 205 36 CWN 1046 34 Bom L R 1567 1932 A L J 919 63 M L J 196 1932 MWN 923

(40) *Ibid* *Rama Rao v. Raja of Pithapur*, 41 M 778 45 IA 148 16 A L J 833 20 Bom L R 1056 23 CWN 173 35 M L J 392 1918 MWN 922 1918 P C 31, *Maharaj Kumar of Vizianagaram, In re*, 56 A 1009 1934 A L J 1237 1934 A 818. This position is however, open to question in view of the P C decision in *Collector of Gorakhpur v. Ram Sundar*, 56 A 488; 61 IA 286, But see *Kumara Krishna v. Sarojina Kumara Krishna*, 1970 S.C. 1735, *Commissioner of Income-tax v. Sivarama Prasad*, 1970 A P 197.

(41) *Ramachandra v. Sukhdeo*, 1935 Nag 133

(42) (1965) Guj 270

(43) *Rama Rao v. Raja of Pithapur*, supra, *Maharaj Kumar of Vizianagaram, In re*, supra, *Commissioner of Income-tax v. Zamindar of Chemudu*, 40 L W 487 57 M 1023 67 M L J 306; 1934 M 608 19 35 WN 770, *Ramchandra v. Sekharam*, 2 B 346, *Vinmat v. Ganpat*, 12 Bom. HC 94

(44) *Thangavelu v. Court of Wards*, 59 L W 430

can claim maintenance as of right.⁴⁵ Nor is this right to maintenance claimable by an adult son in respect of the estate, if the estate is not an ancestral one, because the right to maintenance which the son of the holder of an impartible estate possesses is only an incident attaching to its character as joint family property.⁴⁶ The right of the junior members of a family to be maintained out of the impartible estate which is family property is claimable only by custom, and their illegitimate sons not being sons or brothers of any holder of an ancestral impartible estate, they cannot claim the right except under a custom.⁴⁷

(4) *Improvements*.—Immovable properties in the nature of improvements on the estate form part of the estate and go along with it to the person who is entitled to the estate.⁴⁸

(5) *Accretions*.—Where the self-acquisitions of the holder of an ancestral impartible estate consist of both movable and immovable properties, his power to make them accretions to the estate is confined only to his immovable properties and does not extend to the movables or the income of the estate. If he desires to incorporate his self-acquired immovable properties with the impartible estate, he can do so by declaring his intention to incorporate them with the impartible estate. The crucial test in all such cases is intention, and where there is such incorporation, even immovable properties so incorporated are inheritable by the rule of primogeniture which applies to the main estate.⁴⁹ But no presumption as to an intention to incorporate can be drawn from the blending of the income of the self-acquired property with the income of the impartible estate as in the case of ordinary joint family estate and even in the case of immovable properties acquired by the holder of an impartible estate out of the income of the estate the rule is that in the absence of proof of intention to incorporate that acquisition with the main estate, such acquisition follows the ordinary rule of succession and not the rule of primogeniture.⁵⁰ But if the new acquisition is made out of the funds of the estate as distinguished from the income of the estate, such acquisition would *prima facie* be an accretion to the estate and not the separate property of the holder of the estate.⁵¹ In *Raja of Vizianagaram v. Vishveshwar*,⁵² the law is summarised as follows: "(1) when a claim is made

(45) *Thangavelu v. Court of Wards*, 59 LW 430, *Maharajah of Jeypore v. Vikrama Deo*, 10 LW 436. 52 IC 493. 17 ALJ 1011. 21 Bom. LR 430. 24 CWN 226. 37 MLJ 188. 1919 MWN 824.

(46) *Subbaya v. Marudappa*, 44 MLW 433. 1936 M 828. 71 MLJ 568. 1936 MWN 1034.

(47) *Kumara Krishnan v. Rajeswara*, I LR (1942) M 419. 65 IA 181. 55 LW 65. 1942 MWN 157. 46 CWN 537. 1942 ALJ 194. 44 Bom. LR 551. (1942) 1 MLJ 132. 1942 PC 3. See also *Commissioner of Income-tax v. Krishna Kishore*, 54 LW 635 (1942) 2 MLJ 972.

(48) *Shri Prasad Singh v. Rani Prayag Kumari*, 59 C 1399. 36 LW 266. 59 IA 331. 1932 PC 216. 36 CWN 1046. 34 Bom. LR 1567. 1932 ALJ 919. 63 MLJ 196. 1932 MWN 923. *Someshwari v. Maheshwari*, 63 IA 441. 16 Pat. 1. *Balasubramanya v. Subbaya*, 65 IA. 93. 69 MLJ 632. *Hargovind v. Collector of Etah*, 1937 A 377. I LR (1937) A 292. 1937 ALJ 610.

(49) *Ibid.*—*Jagadamba v. Narain Singh*, 50 LA 1. 18 LW 555. 2 P 319. 44 MLJ 593. 4 PLT 319. 25 Bom. LR 676. 1923 MWN 460. 28 CWN 98. 1923 PC. 59. *Kajjani v. Borrea*, 49 CWN 810. (Movable property does not form an accretion to an ancestral impartible estate). *Mahandera Singh v. Iswar Singh*, 1952 B 243; *Thakur Hari Singh v. Commissioner of Income-tax*, 1968 Raj 3, *Joginder Singh v. Balbhaddar* 1918 All 334.

(50) *Bas Kesarbai v. Shirogani*, 56 B. 619. 34 Bom. LR 1332. 1932 B. 654. *Someshwari v. Maheshwari*, 10 P 630. 1931 P 426; *Hargovind v. Collector of Etah*, supra. *Sham Pratab v. Basma*, 1940 A. 353. *Jitendra v. Bhagwan*, 1956 Pat. 457. *Raja of Vizianagaram v. Vishveswar*, 1955 M. 219.

(51) *Zamindar of Sattur v. Viralakshmi*, 1940 M.W.N. 105. 6940 M. 814.

(52) 1955 Mad. 219. 67 LW. 388.

to a certain property on the ground that it was part of ancestral impartible estate, it must be proved on the evidence adduced in the case that it was made part of that estate. There is no initial presumption one way or the other. (2) The intention of the acquirer to incorporate his acquisitions with the estate may be either express or implied from his conduct or surrounding circumstances. (3) The intention can only be manifested by the holder of the estate and not by the guardian or manager of the property for example by the Court of Wards, on his behalf. See *Kamappa Nayakar v Viralakshmi* ⁵³ (4) No presumption of any intention to incorporate can be drawn from the blending of the income of the self-acquired property with the income of the estate for, the income of the impartible estate is the holder's absolute property. This principle laid down in the earlier decisions of the Privy Council was reaffirmed in *Shiba Prasad's case* ⁵⁴ (5) If the acquisition is made out of the estate, *prima facie* it would be the property of the Zamindari, but if the acquisition is made out of the income of the Zamindari it would *prima facie* be the separate property of the Zamindari unless by express declaration and by acts and circumstances and by necessary implication the intention to incorporate the said property in the Zamindari is made manifest. (6) Where the properties acquired were impartible zamini properties to start with, and the subsequent acquisitions only resulted in the enlargement of the zamini rights in them, the presumption in the absence of proof that the new rights acquired were kept separate, is that they passed as part of the Zamindari. This was reaffirmed in the *Sivagiri's case* ⁵⁵

(6) *Debts*.—The successor to an impartible estate is bound to pay the debts of the last holder both secured and unsecured ⁵⁶. The High Courts of Calcutta ⁵⁷ and Allahabad, ⁵⁸ however, take the view that in the case of ancestral impartible estate, owing to the applicability of the rule of survivorship in matters of succession, the successor is not bound to discharge the obligations of his predecessor unless the latter happens to be the former's father ⁵⁹ so as to place the successor under the pious duty to discharge them or the obligations themselves could be justified either on the ground of benefit or necessity of the estate ⁶⁰.

7 *Income*.—The income from the estate is received by the holder on his own account and not as the Karta of the joint family and is absolutely his, contrasted with the income received by the manager of a joint family for and on behalf of the family ⁶¹.

632 Ancestral impartible estate when ceases to be joint.—In an ancestral, impartible estate, though the other rights which a coparcener acquires by birth in joint family

(53) 1940 Mad 814

(54) 39 I.A. 331

(55) 44 Mad. 1.

(56) *Raja of Kajahast v Achadu*, 30 M. 454; 17 M.L.J. 367, *Zamindar of Karvetnagar v Trustees of Tirumalai*, 32 M. 429 19 M.L.J. 401 2 I.C. 18, But see *Nachiappa v. Chinnayya Swami*, 29 M. 453 16 M.L.J. 339

(57) *Cur Pershad v Dhoni Bai*, 38 C. 182; 7 I.C. 806 15 C.W.N. 49

(58) *Inder Sen v. Harpal*, 34 A. 79; 12 I.C. 915. 1 A.L.J. 1251

(59) *Muttayyan v. Sangli*, 6 M. 1 9 I.A. 128.

(60) See also *Nachiappa v Chinnasami*, supra; *Muttayyan v Sangli*, supra Under S.4 of the Impartible Estates Act, 1904, the powers of the proprietor of an impartible estate are restricted to those of a manager of a joint family.

(61) *Commissioner of Income-tax v. Krishna Kishore*, 34 L.W. 635. (1942) 2 M.L.J. 972. *Commissioner of Income-tax v. Gyan*, 74 Pat. 159 1945 Pat. 205.

property do not exist, the birth-right of the senior member to take by survivorship still remains. It is not a mere *ius successoris* but a contingent right of property which is capable of being renounced and surrendered or otherwise parted with.⁶² "It follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members of the family to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship."⁶³ Since by separation the person separating forfeits his chance of inheriting the whole of the impartible estate by survivorship, it requires strong evidence to establish such separation.⁶⁴ The fact that the members of the joint family or of any branch of the family have exercised their right of partition over their partible property cannot divest them of their right of succession to the impartible estate over which they have no right of partition.⁶⁵ nor can the holder of an impartible Zamindari by giving a registered notice to the junior members of his intention to become divided in status as regards all the partible and impartible properties, put an end to the rights of junior members over the Zamindari. Such a notice can affect the status only as regards partible property.⁶⁶ What has to be found in a case of alleged conversion of an ancestral estate belonging to a joint family into the separate property of the holder is the intention on the part of the members of the family other than the holder of the estate to surrender or renounce their interest in the impartible estate for the purpose of succession. *Chinnathayi v Kulasekara*,⁶⁷ *Gangadhar v Dindyal*,⁶⁸ *Kitencha v Bogwati*,⁶⁹ *Senthathakali Pandaya v Varaguna*.⁷⁰ But when a holder of an ancestral impartible estate, in the exercise of his absolute right of alienation gives the estate to his junior son that son takes the estate as his own separate property as against his brother, so that on the death of that son without male issue, the successor to the estate is established on the footing

(62) *Sellappa v Suppan*, L.L.R. (1937) VI 906 (1937) VI 496 45 M.L.W. 340 (1937) I M.L.J. 422 1937 M.W.N. 12.

(63) *Collector of Gorakhpur v Ram Sundar Mal* 40 L.W. 217 61 I.A. 286 56 A 468 38 C.W.N. 1101 36 Bom.L.R. 867 1934 A.L.J. 779 67 M.L.J. 274 1934 M.W.N. 751 15 P.L.T. 531 1934 P.C. 157 (P.C.), *An. Prasad Singh v Rani Prayag Kumari*, 59 C. 1399 36 L.W. 266 59 I.A. 331 1932 P.C. 216 34 Bom.L.R. 1567 1932 A.L.J. 919 13 P.L.T. 659 1932 M.W.N. 923 36 C.W.N. 1046 63 M.L.J. 196, *Kanammal v Annadanana Jodeya Gounder*, 55 I.A. 114 54 M.L.J. 564 27 L.W. 497 1928 M.W.N. 252 30 Bom.L.R. 802 9 P.L.T. 347 26 A.L.J. 642 32 C.W.N. 983 51 M. 189 1928 F.C. 68, *Chowdhury Chintaman Singh v. Nozlekha Kunwari*, 2 I.A. 263 1 C. 153 and *Chuni Lal v Jaya Gopal*, 17 Lah. 378 1936 Lab. 55, *Bharya Ramanuj Pratap Dey v Lala*, 1968 Pat. 463.

(64) *Collector of Gorakhpur v Ram Sunder Mal*, supra, *Jagadamba v Narain Singh*, 50 I.A. 1 18 L.W. 555 44 M.L.J. 403 4 P.L.T. 319 25 Bom.L.R. 676 1923 M.W.N. 760 28 C.W.N. 98 2 P. 319 1923 P.C. 59, *Lineappa v Kadappa*, 42 Bom.L.R. 832 1940 B. 345 I.L.R. (1940) B. 721.

(65) *Konammal v Annadanana*, supra, *Sahab Gouda v. Basangouda*, 1931 B. 378.

(66) *Annadana v Konammal*, 17 L.W. 107 71 I.C. 533 1923 M.W.N. 15 1923 M. 402; *Chinnathayi v Kulasekara*, 1952 S.C. 29.

(67) 1952 S.C. 29.

(68) 1954 Orissa 142.

(69) 1956 Pat. 457.

(70) 1954 M. 5.

that he held the estate as his separate property descendible to his own heirs and not as a member of the joint family consisting of himself and his brother with the result that his widow is entitled to succeed to the estate in preference to his brother.⁷¹ The holder of an impartible estate which is ancestral can transfer it by gift or sale to anybody he likes, be he a member of the family or a stranger. If he transfers the estate to his widow, on her death the estate will devolve on her or her husband's heirs according as the transfer is an absolute one or for a qualified estate as the case may be. *Jitendra v Bhagwati*.⁷² See also *Senthathikalai Pandy v Varaguna*.⁷³ But where the holder of an ancestral impartible Ray leaves his estate under his will to be taken by his only son (in this case a son adopted by him), he does not break the line of succession but on the contrary gives the estate to the very person who would succeed him under the rule of lineal primogeniture, and hence the will does not change the character of the estate from that of an ancestral impartible Ray to that of a separate property in the hands of the donee.⁷⁴ In *Ulagulam Perumal's case*⁷⁵ the settlor had deliberately broken the line of succession and settled the estate on somebody outside that line, and that is the *ratio decidendi* in that case.

SUCCESSION TO IMPARTIBLE ESTATES

633 Rule of succession—In the absence of special custom regulating the succession to an impartible estate, the customary law regulating it is to be found in the general Hindu Law prevalent in that part of India where it is situate with such qualifications only as flow from the impartible nature of the subject.⁷⁶ Consequently, in applying this law, the impartible estate under the Mitakshara, though in the sole enjoyment of the holder, is to be regarded for the purposes of succession as the joint property of the holder and his family and as passing by survivorship, unless it is shown to be the separate property of the holder or his branch, in which case it is descendible according to the rules of the Mitakshara as to separate property.⁷⁷ There are under the Mitakshara only two possible lines of devolution and the only test to be applied is, was there community or was there separation.⁷⁸ The mere impartibility of the estate is not sufficient to make the succession to it follow the course in the case of separate estate.⁷⁹ If there is absolutely nothing to guide the mind to any other conclusion, an impartible

(71) *Ulagulam Perumal v Subbalakshmi*, 44 MWN 168 1936 M 721 71 MLJ 1, affirmed by FC in 49 LW 621 43 CWN 594, *Shyam Pratap v Basma*, 1940 A 353.

(72) 1956 Pat 457.

(73) 1954 M 5.

(74) *Shyam Pratap v Collector of Etawah*, 1946 PC 103 59 LW 483.

(75) 41 MLW 168 1936 M 721 71 MLJ 1 affirmed by FC in 49 LW 621 43 CWN 594.

(76) *Katama Natchar v Raja of Shrivangana*, 9 MIA 539, *Parbati v Chandrapal*, 31 A 457 36 IA 125 approving *Subramania v Sivakumaramaia*, 17 M 316.

(77) *Krammal v Annadana Jadya Gounder*, 51 M 189 54 MLJ 504 27 LW 497 1928 MWN 252 30 Bom LR 802 9 PLI 347 26 ALJ 642 32 CWN 983 55 IA 114 1928 PC 68, *Anant v Shankar*, 46 CWN 94 46 Bom LR 1 19-3 ALJ 574 56 LW 749 (1943) 2 MLJ 599 1943 PC 196 ILR (1944) B 116 70 IA 232.

(78) *Bayyath v Tej Bali*, 43 A 228 48 IA 195 19 ALJ 317 23 Bom LR 654 25 CWN 564 40 MLJ 387 1921 MWN 300 2 PLT 257 1921 PC 62.

(79) *Venkayamah v Bochia*, 13 MIA 333, *Choudhury Chintamon Singh v Nowlukho Kumari*, 1 C 153 2 IA 263, *Bayyath v Tej Bali*, supra, *Konammal v Annadana Jadya Gounder* supra.

estate will descend according to the law of primogeniture,⁸⁰ and a claimant who will be entitled to succeed under the rule of lineal primogeniture is under the ordinary Mitakshara law entitled to succeed in preference to one who is nearer in degree⁸¹.

634 Ordinary and lineal primogeniture—Primogeniture which means "first born" may be either general or lineal. If it be the former, nearness in blood is the rule of preference, if it be the latter, nearness in line. If an estate is governed by the rule of general primogeniture, a relation who is nearer in degree though in a junior line will be preferred to one who is the eldest member of a senior line who will be the preferential heir under the rule of lineal primogeniture. Ordinarily an impartible estate is governed by lineal primogeniture rather than the other rule.⁸² In other words, degree prevails in general primogeniture while line prevails in lineal primogeniture.⁸³

635. Operation of the rule of primogeniture among sons.—The primogeniture means "first born" and denotes the preferential right of the seniormost in age to succeed to the estate. Thus among sons of the same wife or by different wives, the seniormost in age is entitled to succeed to the estate in preference to his younger brothers though born of wives senior to his mother.⁸⁴ But a custom displacing the above rule of succession can be established whereby a son of a wife married earlier excludes a son of a wife subsequently married.⁸⁵ If, however, the wives have been taken from different classes, some superior and others inferior, it is the eldest son of the seniormost wife of the most superior class that should be preferred to a son of a wife belonging to an inferior community.⁸⁶ So also as between an adopted son and an aurasa son, the latter excludes the former in spite of the former's seniority in age, the reason being that the adopted son is a substitute for the aurasa son and by the aurasa son coming into existence, he excludes the substitute.⁸⁷ The religious factor which gives the preference to the aurasa son as against the adopted son, and to the son of the wife of a superior class as against that of a wife of an inferior class also accounted for the exclusion of an illegitimate son by the legitimate son, though when the latter succeeds to an impartible estate, his illegitimate brother, if he remains undivided with him, will be entitled

(80) *Ishri Singh v Baldeo Sing*, 10 C 772 11 IA 135

(81) *Bibi Baksh Singh v Chandrabai Singh*, 32 A. 599 37 IA 168 7 ALJ 1122 12 Bom LR 1015 14 CWN 1010 1910 MWN 643 20 MLJ 917 7 IC 724

(82) *Ibid*, *Batnath v Tej Bali*, 43 A 228 48 IA 195 19 ALJ 317 23 Bom LR 654 25 CWN 564 40 MLJ 387 1921 MWN 300 2 PLT. 257 1921 PC. 62; *Kochi Kalyana Rengappa v Kochi Uva Rengappa*, 28 M 508 32 IA 261 2 ALJ 745 7 Bom LR 907 10 CWN 95 15 MLJ 312, *Sahabgouda v Basangouda*, 33 Bom LR 580 1931 B 378

(83) *Mohesh v Srirughan*, 29 C 343 29 IA 62 4 Bom LR 372 6 CWN. 459, *Hargovind v Collector of Etah*, 1937 A 377 1 LR (1937) A 792

(84) *Ramalakshmi v Sivananitha*, 14 MIA 570 1 A Supp 1, *Jagadish Bahadur v Sheo Persad*, 23 A, 369 28 1 A 100 5 CWN. 602 11 MLJ 178 3 Bom LR 208

(85) *Sundaralingaswami v Ramaswami*, 22 M. 515 26 IA. 55 1 Bom LR 850

(86) *Ramaswami v Sundaralingaswami*, 17 M 422

(87) *Sakebgouda v Shiddangouda*, 41 Bom LR 333. 1939 B 166 1 LR (1939) B. 314

to succeed to him on his death without male issue on the principle of survivorship,⁸⁸ provided the estate was the separate estate of the father. If the estate, on the other hand, was an ancestral estate to which their father had succeeded on the rule of primogeniture, on the death without male issue of his ancestor son who succeeded the father, the estate would go to the undivided collateral relations of the father and not to the illegitimate son. But in the case of an estate governed by the rule of local primogeniture, the estate is taken on the death of its holder, by a member of a junior branch, and subsequently the widow of the last holder makes an adoption of the adopted son as the representative of the senior branch divests the estate in the hands of the member of the junior branch who had taken it prior to the adoption.⁸⁹

636 Whole blood and half blood.—In a joint family impartible estate, nearness of blood is not a ground of preference, but only seniority in age, and among brothers, some of whom are of full blood and others of half blood, the senior most among them though of the half blood will exclude the rest.⁹⁰ But if the estate is the separate property of the last holder a brother of the full blood though younger will exclude a brother of the half blood.⁹¹

637 Position of females.—If an impartible estate is the property of a joint undivided family the person entitled to succeed will be designated by survivorship and no female can succeed so long as there is a male member of the joint family qualified to take the estate.⁹² Thus where the holder of such an estate dies without legitimate male issue, the succession under the Mitakshara should go to a collateral male member of the joint family in preference to the widow or daughter of the last holder.⁹³ A custom modifying the law in this respect so as to let in the widow or the daughter of the last holder as a preferential heir as against the male members of the joint family should be strictly proved.⁹⁴ But if the estate was held by one who is the sole surviving coparcener⁹⁵ or was his separate property, though he himself was a member of the joint family⁹⁶ on his death without male issue, the estate, in the absence of a custom excluding females⁹⁷ passes to the widow,⁹⁸ and failing his widow, to a daughter or

(88) *Jogendra v. Nityanand*, 18 C. 151 17 I.A. 128, *Subramania v. Sivasubramania*, 17 M. 316, 4 M.L.J. 152

(89) *Lingappa v. Kadappa*, 42 Bom. L.R. 832 1940 B. 345

(90) *Ramaswami v. Sundaralingaswami*, 17 M. 422; *Subramania v. Sivasubramania*, supra.

(91) *Baynath v. Tej Bai*, 43 A. 228 48 I.A. 195 19 A.L.J. 317 23 Bom. L.R. 654 25 G.W.N. 564 40 M.L.J. 387, 1923 M.W.N. 300 2 P.L.T. 257 1921 P.C. 62, *Rup Singh v. Basim*, 7 A. 1 11 I.A. 149, *Chintamani v. Nowlukho*, 1 C. 153 2 I.A. 263, *Kachi Kaliyana v. Kachi*, 28 M. 508 32 I.A. 261 2 A.L.J. 845 7 Bom. L.R. 907 10 G.W.N. 95 15 M.L.J. 312

(92) *Chintamani v. Nowlukho*, supra.

(93) *Ibid*; *Rup Singh v. Basim*, supra, *Hari Nath v. Ram Narayan*, 9 Beng. L.R. 274 17 W.R. 316

(94) *Amarendra v. Banamali*, 10 P. 1 1930 P. 147

(95) *Venkata v. Venkama*, 13 M.I.A. 113

(96) *Ram Nundun Singh v. Janki Koor*, 29 C. 828; 29 I.A. 178; 4 Bom. L.R. 664 7 G.W.N. 57, *Ibrahim Ali Khali v. Muhammad Aliyaz Ullah*, 39 I.A. 85 39 C. 711 13 I.C. 695 1912 M.W.N. 316 16 G.W.N. 625 9 A.L.J. 390 14 Bom. L.R. 270; 22 M.L.J. 478, *Raja Aja Varna v. M. Vijay Kumar*, 33 G.W.N. 585 (P.C.), *Chatter v. Rashan*, 1946 N. 278

(97) *Tara Kumari v. Chaturbhuy*, 42 C. 1179 42 I.A. 192 13 A.L.J. 1034 17 Bom. L.R. 1012; 19 G.W.N. 1119 29 M.L.J. 371 2 L.W. 843; 1915 M.W.N. 717 1915 P.C. 30, *Katama Natchar v. Raja of Singagur*, 9 M.I.A. 539,

daughter's son following the course of succession which the law prescribes for a separate estate.⁹⁸ If a separated holder of an impartible estate dies leaving a widow and an illegitimate son, the former excludes the latter in the matter of succession to the estate.⁹⁹ And in the absence of such heirs, his estate is taken by the senior most member of the senior most of the collateral lines of equal degree of kinship, even though the taker may be younger than the representative of a junior branch.¹⁰⁰ In a case before the Madras High Court¹⁰¹ it was argued that as it had been held by the Privy Council in *Vellatappa's case*¹⁰² that an illegitimate son by a permanent concubine was a member of the father's family he must be considered as a preferential heir as against the widow of the holder of the estate who was a Sudra, but this contention was rejected after elaborate discussion, and the widow was held entitled to succeed as against the illegitimate son who, however, was held entitled to receive maintenance out of the estate which had come to the widow.

638 Succession to a Dayabhaga impartible estate—Since an impartible estate governed by the Dayabhaga School, partakes of the nature of a separate estate of its holder, on his death without male issue, a nearer heir excludes a remoter heir. Hence a brother of the full blood, though younger, will exclude a brother of the half blood.¹⁰³ If there are more than one in the same degree of relationship seniority determines the right of succession.

(98) *Kotama Natchiar v. Raja of Sivaganga*, 9 M.I.A. 539, *Parbati Kurwar v. Chandrapal*, 31 A. 457 36 I.A. 125 6 A.L.J. 767 11 Bom.L.R. 890 13 C.W.N. 1073 19 M.L.J. 605 4 I.C. 25, *Thakurani Tara Kumari v. Chaturbhuj Narain* 42 C. 1179 42 I.A. 192 13 A.L.J. 1034; 17 Bom.L.R. 1012 19 C.W.N. 1119 29 M.L.J. 371 2 L.W. 843 1915 M.W.N. 717 1915 P.C. 30, *Muttuswagopalatha Thevar v. Periasami*, 19 M. 451 23 I.A. 125 6 M.L.J. 149

(99) *Kamalmal v. Viswanathaswami* 24 M.L.J. 270 18 I.C. 1006 1913 M.W.N. 192, *Thangavelu v. Court of Wards*, 59 L.W. 430

(100) *Guruswami v. Pandia Chinnai Thevar*, 44 M. 1, but see *Muttu Vaduganatha v. Durasingha*, 3 M. 190, See also *Viswanathaswami v. Krishnammal*, 17 M. 316

(101) *Thangavelu v. Court of Wards*, supra

(102) *Vellatappa v. Nakarajan*, 55 M. 1 58 I.A. 402 1931 P.C. 294 34 L.W. 58 61 M.L.J. 522 35 C.W.N. 278

(103) *Neel Kishor v. Beer Chander*, 12 M.I.A. 523.

CHAPTER XVII

THE LAW OF THE MALABAR TARWAD

Section	Section.
639 Constitution of a Malabar Tarwad.	648 Debts and alienations
640 Management of the Tarwad.	649 Preservation of property
641. Position of the Kari	650 Marriage
642 Karar and restriction of Karnavan's rights	Malabar Marriage Act (VI of 1896)
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639 Constitution of a Malabar Tarwad—Malabar, popularly associated with magic and mysticism, differs in its law of joint family and succession from the rest of India having a Code of morals comparable to that of companionate marriages in the western world. *Marumakkattayam* and the *Aiyasautam* are the two kindred systems of inheritance obtaining there, in which descent is traced in the female line, both the words meaning inheritance to the sister's son. Another peculiar institution common to these systems is that of the tarwad which consists of a group of persons forming a joint family with community of property, such a group being descended in the female line from a common ancestress. The essential features of a tarwad are (i) The impartibility of the joint estate except by the conjoint will of all its constituent members, (ii) Non-recognition of marriage as a legal institution, (iii) Descent being traced through females, (iv) The management being vested in the seniormost member, the others having only the right to maintenance, and (v) Exclusion from membership of the issue of the male members of the tarwad. Thus in the case of a woman belonging to a tarwad, all her daughters and sons and all the descendants, whether male or female, of such daughters in the female line, will belong to that tarwad but the descendants, whether male or female, whether in the male or in the female line, of her sons cannot claim to be members of the tarwad.¹ Hence the daughter's daughters and daughter's sons of a lady are within the fold of her tarwad, her son's sons or son's daughters cannot claim to be its members, but belong to the tarwad of their mother—namely, the son's wife. In other words, a tarwad consists of females, their female descendants in the female line, the sons of such females and of such female descendants, and the sons of the deceased female members of the tarwad. A tarwad may consist of several *tavazhis*. A *tavazhi* means the group of persons consisting of a female, her children and all her descendants in the female line.² Thus some of the female members of a tarwad may each have a *tavazhi* of her own. Thus when a tarwad consists of a brother and his sisters, one of the sisters with her children and all her descendants in the female line constitutes her *tavazhi* as distinct from the *tavazhi* of another sister, consisting of herself, her children, and all her descendants in the female line. Thus

(1) *Pakarn v Pathamma*, 1930 M 922

(2) *Moithyan v Puzhappurayal*, 28 L W 491 at 493 51 M 574 1928 M.W.N 331. 55 M L J 208 1928 M 870

in one sense a tarwad is a larger tavazhi, because even a tarwad consists of members who trace their descent through the female line from a common ancestress. But there is one essential distinction between a tarwad and a tavazhi and this is while possession of property is not a necessary condition of a tavazhi, the existence of community of property is an essential incident of tarwad relationship. Tarwad in other words is a distinct social unit having a corporate existence dealing as such with the outside world, but a tavazhi is only a minor member of that unit having no recognised status apart from that unit in respect of the common property of the tarwad. But a tavazhi may have its own separate property as distinct from the property of the tarwad and hold and enjoy it to the exclusion of the other members of the tarwad who do not belong to that tavazhi.¹ In other words, a tavazhi when it has separate property of its own, is in the position of a tarwad within the tarwad in the same way as there can be a coparcenary within a coparcenary under the Mitakshara school. Like the Hindu coparcenary the tarwad or the tavazhi is a creature of law and cannot be created by act of parties.² There cannot be a tavazhi consisting of a woman and only some of her children and such a corporate unit being unknown to Hindu Law, it is not open to a person to create such a corporate unit.³ Even marriage does not transplant a woman from the tarwad of her mother into the tarwad of her husband. A woman in spite of her marriage remains a member of the tarwad of her birth with the rights of residence and maintenance therein unaffected. The only means by which strangers can be made members of a tarwad is by adoption, but this can be resorted to only when the tarwad is threatened with extinction and the consent of all the members is obtained.⁴

In the following sections only the incidents of the Marumakkattayam system are considered, the Aliyasantana system differing from it in only some very minor particulars, these being

(i) while under the Marumakkattayam law, the eldest male is the karnavan or manager of the tarwad, under the Aliyasantana law, the eldest member of the tarwad, whether male or female, is entitled to be the manager,

(ii) while under the former system, the separate property of a male member is on his death taken by his tarwad⁵ under the latter system it goes to his nearest heirs⁷

(iii) while under the former system the females generally reside in their own tarwads in the latter they usually reside in the tarwads of their husbands

(iv) while inter-caste marriages in the former system are common and not disapproved, such marriages in the latter system invite an amount of disapprobation and censure as being mere illicit relationships though not involving degradation or ex-communication, and

(v) while Marumakkattayam system is followed by all castes the Aliyasantana system is not followed by the Brahmans (P. R. Sundara Iyer's *Malabar and Aliyasantana Law*, 1922 Edn p. 247).

(3) *Ambu Nair v. Uthi Amma*, 1937 M.W.N. 1254, 1938 M. 202.

(4) *Mothayan v. Puthapayyal*, 28 L.W. 491 at 493; 51 M. 574; 1928 M. 870; 1928 M.W.N. 331; 55 M.L.J. 208.

(5) *Thathamangalath v. Krishna*, 38 L.W. 970, 57 M. 725; 67 M.L.J. 511; 1934 M. 286; *Vasudhan v. Secretary of State*, 11 M. 167, *Ramesh Menon v. Ramon Menon*, 24 M. 78; 27 I.A. 231; 4 C.W.N. 310; 10 M.L.J. 245.

(6) *Gundam v. Sankaran*, 32 M. 351; 2 I.C. 183; 19 M.L.J. 350 (R.B.).

(7) *Antamma v. Kargi*, 7 M. 575.

640. Management of the tarwad—The management of the tarwad vests in the eldest male member of the tarwad except that the eldest female member may be such manager when there is a custom to that effect⁹ or there is no male member of the tarwad. Such a manager, when a male, is known as the Karnavan, and when a female as a Karnavathi. A Karnavan may administer the estate for the benefit of the family according to his own discretion. Large as the powers of the Karnavan appear to be, those powers are essentially powers of management. His position is fiduciary in respect of the junior members who are known as Anandravans and he has no larger right of ownership than any such member.¹⁰ The right of junior members is confined to maintenance, to preventing the Karnavan from wasting or improperly alienating the tarwad property and to suing for his removal for incompetence or bad management.¹¹

641 Position of the Karnavan—Like the manager of a Mitakshara joint family, the Karnavan is the representative of the tarwad, the protector of its interest,¹² and the guardian of its minor members.¹³ The Karnavan not only manages the affairs of the tarwad but also symbolises the unity and solidarity of the members who constitute it. In so far as outsiders are concerned, the Karnavan represents the entire tarwad, its assets and its members and he is competent to give a valid discharge on behalf of the tarwad.¹⁴ He is in a fiduciary position to the junior members, must maintain them consistent with the tarward means, and represent their corporate interests in suits and transactions for and on behalf of the tarwad. Thus a compromise decree obtained against a Karnavan who in substance can be considered to have sued or have been sued as representing the tarwad is binding upon the tarwad.¹⁵ He has larger powers of disposal in respect of movable than in the case of immovable property and in the absence of proof of fraud or collusion, an assignment for consideration of a hypothecation debt which should be treated as movable property is binding on the junior members even in the absence of tarwad necessity.¹⁶ But as regards immovable property, his powers of disposal are very much restricted and could be validly exercised only when justified by tarwad necessity or benefit. But if he incurs debts for tarwad necessity or benefit, the creditor can proceed in execution of the decree obtained thereon to realise his dues from the tarwad properties.¹⁷ In the absence of any proof of his having abused his position or fraudulently alienated family properties or misappropriated family funds or being a bad manager, he is not accountable to the other members.¹⁸ A Karnavan can delegate his power of management orally or in writing.¹⁹ The

(9) *Chatti v. Chambejan*, 1930 M. 418, 1929 M.W.N. 873.

(10) *Gopalakrishnan v. Surendranathan*, I.L.R. (1969) 2 Ker. 273.

(11) *Manavedan v. Sridevi*, 25 L.W. 284, 50 M. 431, 1927 M. 422, 52 M.L.J. 277.

(12) *Kenath v. Kallam*, 18 L.W. 203 at 205; 1923 M. 700, 45 M.L.J. 258, 1923 M.W.N. 807; *Aswami v. Lakshmi*, 48 L.W. 803, 1938 M.W.N. 1136.

(13) *Ukkandan v. Umkumaran*, 6 M.L.J. 139.

(14) *Sankara Pillai v. Kesavan*, 1974 Ker. L.T. 491.

(15) *Rayarappa v. Kamaran*, 8 L.W. 154; 45 I.C. 489; 35 M.L.J. 51.

(16) *Gowda v. Karthyayyan*, 34 L.W. 365, 1931 M. 726, 61 M.L.J. 35.

(17) *Paramal v. Narayanan*, 35 L.W. 452; 1932 M. 701, *Narayanan v. Sundaram*, 43 L.W. 584, 1936 M.W.N. 279; 1936 M. 463 (Karnavan starting a Kuris discharge debts); *Pambayya v. Chennappa*, 1940 M. 165; 1939 M.W.N. 1229.

(18) *Manavedan v. Sridevi*, supra.

(19) *Gopalakrishnan v. Surendranathan*, supra.

status of Karnavan being however conferred on a person by law owing to his seniority in age, any delegation by him of his powers to one who is not his next senior in age amongst the male members of the tarwad is invalid and such delegate cannot be allowed to function as such.¹⁰ Delegation is only a kind of temporary renunciation, and as it is well known that by a renunciation of Karnavanship none except the seniormost Anandravan can step into the position of the Karnavan, it seems undesirable in the interests of peace and smooth-working of the tarwad that a Karnavan should be permitted to overlook the claims of the seniormost Anandravan by delegating his powers to anybody else. When a Karnavan is guilty of fraud, misappropriation or mismanagement or becomes incompetent to manage the property by age or disease, a suit lies to remove him from the Karnavanship at the instance of the junior members.¹¹

642. Karar and restriction of Karnavan's right—Karnavanship is a very valued right among members of a Marumakkattayam tarwad and the only means by which this right of Karnavanship can be lost to the senior most member are (1) removal by decree of Court, (2) renunciation by act of party, and (3) by death. But it is a matter of frequent occurrence in Malabar that members of a tarwad agree by means of Karars to have the rights of the existing Karnavan restricted in certain particulars either by compelling him to associate some other junior members with him in the management of the tarwad property or by putting other restrictions on his powers. The effect of such Karars is only to limit the powers of the particular Karnavan concerned, and that persons who were only junior members at the time would not be bound by such restrictions when they become, in their turn, Karnavans of the tarwad unless by themselves being parties to the Karar they have expressed themselves to be bound by such provisions even when they become Karnavans. The same principles would apply to cases where restrictions were imposed by decree of Court on a person who was the *de jure* Karnavan on the date of the decree. Such restrictions would *prima facie* cease to have operation on the death of the particular Karnavan concerned, unless there be something specific in, or necessarily implied by, the decree to the contrary.¹² The adult members of a tarwad have it in their power with the consent of the *de jure* Karnavan to vary the terms of such a Karar by a majority vote taken in a family council.¹³ Where the adult members of a tarwad enter into a family arrangement, all the minors who have been represented by their guardians would be bound by that arrangement even though claims doubtful in their nature have been admitted thereunder,¹⁴ except when the arrangement was in fraud of their rights.¹⁵

643. Rights of Anandravans—Every junior member of the tarwad is entitled (i) to reasonable maintenance from the tarwad income, (ii) to restrain the Karnavan from improperly dealing with the tarwad property, and (iii) to succeed to the Karnavanship in case of death, renunciation or removal of a Karnavan if there is no other Anandravan senior to him.

(19) *Raman v Beter*, 1929 M. 266 1928 M.W.N. 713, *Krishnan v Ammulu*, 54 L.W. 379 (1942) 2 M.L.J. 472 1941 M.W.N. 849 1942 M. 90 (Where there is a Karnavan capable of acting and he is not shown to have renounced his powers, he alone and none else can bind the family)

(20) *Kunhan v Sankara*, 14 M. 78, *Chandan Nambiar v Kunhu Raman*, 7 L.W. 543 41 M. 577 45 I.C. 26 34 M.L.J. 400 1918 M.W.N. 283 (F.B.), *Nemanna v Lechmu*, 43 M. 319 11 L.W. 49 37 M.L.J. 539 1920 M.W.N. 117

(21) *Sankunni v Krishna*, 27 L.W. 93 51 M. 329 1928 M. 465 54 M.L.J. 682

(22) *Cherla v Unnalaiah*, 5 L.W. 392 38 I.C. 513 1917 M.W.N. 185 32 M.L.J. 323

(23) *Parakkal v Koram*, 1912 M.W.N. 552 14 I.C. 295.

(24) *Charudor v Kilappan*, 31 M.L.J. 879 34 I.C. 818 1917 M.W.N. 106.

in age. Thus though there is no doubt that as a general rule the tarwad is represented by its Karnavan in all transactions with strangers, yet when the Karnavan does anything not in the interest of the tarwad but to its prejudice, the Anandravans are entitled to take necessary steps for the protection of the common interests and to reimburse themselves from the tarwad funds the expenses properly incurred by them in respect of such steps.²⁵

644 Maintenance.—As an incident of a junior member's co-proprietorship in the property of the tarwad, there is in him or her, the right to be maintained out of the tarwad income and this right is not founded on any moral or quasi-legal obligations or inability to maintain himself or herself.²⁶ This right to maintenance of the junior member cannot be denied by the Karnavan either on the ground of that member's misbehaviour or on the ground of his possession of separate property.²⁷ The members of a tarwad are entitled to receive maintenance out of the tarwad house when there is no room for them in that house and if the Karnavan makes an insufficient allowance, the Anandravans are entitled to apply to the Court to determine what allowance is sufficient having regard to the circumstances of the family. The circumstances of the family which may be taken into consideration on such discussion before the Court are dealt with in the case of *Thayu v Shungunn*.²⁸ The general principle is this *Prima facie*, the junior members living out of the tarwad house should be treated equally, but the circumstance of each particular one can be taken into consideration and it is for the Karnavan to judge how much each particular one should get. He may take into consideration, no doubt things like the health of a particular child or the education of a particularly intelligent child or a child with small intelligence, he can take into account the earning capacity of a junior member, apparently it has been laid down that he can also take into account the fact that a particular person has himself made a rich marriage; and there are many other things which the Karnavan, in exercising his discretion as, so to speak, the father of this family, can take into consideration. If a junior member is aggrieved he can come to the Court and apply for maintenance and ask the Court to say what allowance is sufficient. But on any such application to the Court very great weight should be given to the decision of the Karnavan which ought not to be lightly interfered with.²⁹ But the legal claim of maintenance is not confined to the actual rice and condiments necessary for the members. What is called "Menchelavu" is also properly allowable when the tarwad income is large enough to warrant the same. Such menchelavu would no doubt differ with the status of the family and the usage obtaining in the locality. A prudent Karnavan ought to make, out of the income of the tarwad properties provision for extraordinary expenses that may have to be incurred on auspicious or inauspicious occasions in the family. Hence the junior members are not entitled to claim that the whole of the income should be distributed amongst the members for their maintenance. But it will not be proper for the Karnavan to deduct from a particular year's income the whole of the extraordinary expenses incurred that year and to allot maintenance to the members only out of the balance. There is no definite ratio in relation to which the income has to be apportioned among the members for their maintenance. Thus a Karnavan, though entitled to

(25) *Raja of Arakkal v Kunth Kannan*, 29 M.L.J. 632 31 I.C. 482 (2).

(26) *Amman v Padmanabha*, 41 M. 1075 48 I.C. 104 35 M.L.J. 509, See the discussion of the nature of this right in *Govindan v. Kunnappu*, 71 M.L.J. 514: 1936 M.W.N. 1102 44 L.W. 612 1936 M. 917

(27) *Tayan v Raghavan*, 4 M. 171

(28) 5 M. 71

(29) *Kanhalikutty v. Kunhamayan*, 17 L.W. 536 44 M.L.J. 212 1923 M.W.N. 247 46 M. 567 1923 M. 780.

something more than other members to keep up his position as the head of the tarwad, is not entitled to appropriate for himself any definite portion of the income, just as 50 per cent. nor is there a hard and fast rule that all minor members, whatever be their age and whatever be the amount of the maintenance allowed, should only get half of what is allowed to an adult. Neither is the possession of separate properties by a junior member by itself an impediment to that member claiming maintenance from the tarwad properties, it is only when the income from the tarwad properties is not sufficient for the maintenance of all the tarwad members, the circumstance that a junior member possesses separate property would become in any way relevant. If the tarwad gets an income which is more than sufficient to pay maintenance to all its members, possession of separate property by a member thereof is immaterial in considering the amount of maintenance payable to him or her from the tarwad income.³⁰

645 Separate maintenance—Though the general rule is that a junior member is not entitled to separate maintenance, the rule is subject to exceptions.³¹ Thus a junior member of the tarwad living away from the tarwad house for a good and proper cause is entitled to claim separate maintenance out of the tarwad estate, but the onus of proving such cause is on that member. The female members of a tarwad living away from the tarwad house with their husbands employed elsewhere are entitled to claim such separate maintenance for themselves and their children living with them, since their living away is one for proper cause. So also a junior member leaving the tarwad house to live elsewhere to practise a profession for which he has qualified himself should be taken to live outside the tarwad house for a proper cause and it does not matter whether such a member practises his profession in a place near the tarwad house or far away from it. To hold otherwise would be to put a premium on idleness and to destroy the incentive to members of a tarwad to enter a profession for the purpose of getting on in the world and earning their own livelihood. Where there is substantial inconvenience in living in the family house and the Karnavan's conduct affords a valid excuse for a member to live away, separate maintenance may be awarded to the junior member.³² But if that member himself is responsible for the discomfort or disharmony which he puts forward as ground for living away from the rest, he is not entitled to claim separate maintenance.³³ In addition to the above there may be other grounds which on social or economical reasons may be considered proper.³⁴ Thus a male member of the tarwad going to live with his wife for managing her affairs³⁵ or living away from the tarwad house for prosecuting his studies at a distant college or university or for helping his father in his old age, will be entitled to separate maintenance, though in no case can he claim it in a measure to which he will not be entitled if he resides in the tarwad house itself.

646 Maintenance arrangement subject to modification—Maintenance arrangements are subject to modification: there is an appreciable or material change in the circumstances of the family. But a Karnavan is not entitled to set aside an existing arrangement

(30) *Ammalu Kutti v Ramunni Menon*, 40 LW 35 67 M.L.J. 470 1934 M 508, See the discussion in *Ayyappa v Devaraja*, 49 M 407 1926 M 723 24 LW 269 50 M.L.J. 434 1926 MWN 413.

(31) *Peru v Ayyappa*, 2 M 282

(32) *Ammalu Kutti v Ramunni Menon*, supra; *Peru v Ayyappa*, supra.

(33) *Kanchi v Ammu*, 36 M 591 24 M.L.J. 559 16 I.C. 178 1912 M.W.N. 1233

(34) *Mavaden v Pamakka*, 36 M 203 22 M.L.J. 309. 14 I.C. 383 1912 MWN 109

(35) 35 M.L.J. 565

unless he makes some other suitable arrangement ³⁸ In a suit to enforce a maintenance claim having the effect of disturbing a maintenance arrangement, the whole tarwad has to be properly represented and all the persons interested must be made parties ³⁹

547 Acquisitions and presumption.—Acquisitions may be by individuals or groups and may be by purchase or gift. The acquisitions of a woman, in the absence of evidence to the contrary are to be presumed to have been made out of funds supplied by her husband for the benefit of his wife and children, such presumption being rebuttable ⁴⁰ Property purchased by the Karnavan either in his own name⁴¹ or in the name of a junior member may be presumed to be the tarwad property, but if it is purchased by a junior member in his own name, this presumption does not apply ⁴² But even in the latter case, if the junior member acquiring the property is the head of a tavazhi within the tarwad and is in possession of property belonging separately to that tavazhi, the presumption will be that the property acquired is really the property of the whole tavazhi. But these are only presumptions and in any particular case it is open to the persons interested to show that the acquisition by the Karnavan or the junior member is or is not out of the tarwad assets which in certain stated circumstances were left in his hands ⁴³ In the same way, a gift in favour of a Karnavan, or the head of a tavazhi,⁴⁴ may be presumed to enure for the benefit of the whole tarwad or tavazhi, though by express words contained in the instrument of gift the operation of this presumption may be avoided. But if the gift is only to a particular individual by name who does not happen to be the Karnavan of the tarwad or the head of a tavazhi, the presumption is that the property is taken by the donee as his or her absolute property. If the property is given by a person to his wife⁴⁵ or to the wife

(36) *Krishna v Razukoth*, 1936 M 598, *Kutisan v Kunhamma*, 57 L.W. 161 1944 M.W.N. 162 (1944) 1 M.L.J. 218 1944 M 334.

(37) *Sara v Kunhamad*, 23 L.W. 584 1926 M 810, *Makkan v Kunhi*, 1938 M 289.

(38) *Jenamma Pillai v State of Kerala*, 1974 Ker L.T. 750 (F.B.).

(39) *Ahmad v Manja*, 1926 M 643 23 L.W. 575, *Kunhamma v Timmaju*, 27 M.L.J. 60 24 I.C. 246, *Chettuv v Sekharan*, 1925 M 420, *Jutton Unni v Kochum*, 1 L.R. (1944) M 515 1944 M.W.N. 260 57 L.W. 224 (1944) 1 M.L.J. 272 1944 M 378 (Where there are properties attached to a stanom, the stanom has the right to utilise the income for his own purposes, and the members of the tarwad are not entitled to claim maintenance out of such income. The properties acquired by a stanom out of the income of the stanom properties become on his death the properties of the Kovilgam in which he was born unless he has shown an intention to attach them to the stanom) See also *Mercuri Kunhi Ramon v. Vengilari*, (1939) 2 M.L.J. 757 50 L.W. 676 1940 M. 579 (There is no presumption of the acquisition being family property in the absence of sufficient family nucleus)

(40) *Ahmad v Manja*, 1926 M 643 23 L.W. 575, *Narayanan v. Govindan*, 26 Tr. L.R. 190 (F.B.), *Subramanya v. Krishnan*, 12 L.W. 361 60 I.C. 77 39 M.L.J. 590. See contra *Dhanyu v. Dejamma*, 5 L.W. 259 38 I.C. 292 1917 M.W.N. 535, *Isaacson v. Vishnu*, 33 L.W. 611 1931 M. 634; 60 M.L.J. 467.

(41) *Sanku v Puttamma*, 14 M 289, *Thimmakka v Akka*, 34 M. 481 7 I.C. 153 1910 M.W.N. 293, *Isaacson v. Vishnu*, supra *Asenikut v. Mamad*, 1939 M 295 1939 M.W.N. 4 (1939) 1 M.L.J. 308.

(42) *Koshi v. Narayana*, 22 Tr. L.R. 239.

(43) *Kalhan v. Gomda*, 35 M 648 (1911) 2 M.W.N. 487 22 M.L.J. 23 12 I.C. 492; *Naku v. Raghuva*, 38 M, 79 18 I.C. 1 But see *Narasamma v. Bylla Kuru*, 25 M.L.J. 637; 31 I.C. 543 and *Paru v. Itcheri*, 32 I.C. 459, but if the wife has no children at the time of the gift, the presumption is that she takes the property absolutely *Kallant v. Karthayagan*, 1927 M 259 52 M.L.J. 17. See however *Sieya v. Kishan*, 1955 Ker 70 (F.B.).

and her children⁴⁴ or to all the children after the wife's death, or if a gift is made by a person to his daughter⁴⁵ or to all the issue of his sister after the death of that sister⁴⁶ the gift enures to the benefit of the whole tavazhi of the donee or donees. But if the gift is made only to some of the members of a tavazhi, as for instance, a gift by a husband to his wife and his children by her excluding her children by a former husband, the donees take the property as tenants-in-common as they do not exhaust the whole tavazhi in which case alone the presumption in favour of the whole tavazhi will operate.⁴⁷ It is only in cases where the gift or acquisition made in favour of a marumakkathayee woman and all her children or in the names of all the children who by themselves constitute a tavazhi (the mother being dead) that a presumption would arise that the acquisition is for the benefit of the tavazhi. There is no scope for raising any such presumption in cases where the gift, bequest or acquisition is in favour of the wife alone, or the wife and some of her children alone leaving out the others. The underlying principle is that the presumption would be attracted only in cases where the transaction is in favour of all the members of a group who constitute a natural tavazhi capable of acquiring and holding property.⁴⁸ Where a trade has been started and carried on by the Karnavan or another member of the tarwad even with the moneys of the tarwad, that trade or acquisitions from its profits cannot be presumed to belong to the tarwad, though there may be an accountability to the family in respect of the family moneys utilised in the business as loans made by the family to the member carrying on the trade.⁴⁹

648 Debts and alienations—In the management of a tarwad, the Karnavan will often be faced with circumstances necessitating his pledging the credit of the tarwad for running the family. Maintenance of the Anandravans,⁵⁰ their education⁵¹ and marriage,⁵² other auspicious and inauspicious ceremonies in the family⁵³ the protection of the property and the necessary litigation, payment of binding debts and the interest thereon, defence of the members in criminal proceedings,⁵⁴ arrears of revenue, medical charges,⁵⁵ residential provisions for the junior members, these and a hundred other things may require the Karnavan to incur debts on behalf of the family, and such debts, being necessary for the tarwad, will be binding on the tarwad, so that the creditor who has advanced them is entitled to proceed against the tarwad assets for realising his dues after obtaining a decree against the Karnavan who has

(44) *Kunhecha v. Kutsi Mammal*, 16 M. 201 2 M.L.J. 226 (F.B.); *Chakkara v. Kunhi*, 39 M. 317 30 I.C. 755; 29 M.L.J. 481 1915 M.W.N. 740; *Janamma Pillai v. State of Kerala*, 1974 Ker.L.T. 750 (F.B.)

(45) *Kushammed v. Chera*, 1924 M. 787 20 L.W. 41 1924 M.W.N. 480 47 M.L.J. 679

(46) L.P.A. No. XIX of 1926

(47) *Mothiyyan v. Pathiyapwarai*, 28 L.W. 491 51 M. 574; 1928 M. 870 1928 M.W.N. 331 55 M.L.J. 208. See also *Krishnan v. Kunhi*, 1942 M. 295

(48) *Seeta v. Krishna*, 1 I.L.R. (1975) Ker. 1 1975 Ker. 70 (F.B.)

(49) *Assankuth v. Mammad*, 1930 M.W.N. 4; (1939) 1 M.L.J. 308; 1939 M. 295.

(50) *Seshappa v. Devoraja*, 49 M. 407. 24 L.W. 269, 1926 M. 723 50 M.L.J. 434 1926 M.W.N. 413.

(51) *Nedakanta v. Ananthanarayana*, 19 M.L.J. 590. 4 I.C. 724; *Krishnan v. Gopinath*, 8 M.L.J. 294.

(52) *Ammalu v. Ramuvaru*, 40 L.W. 35 1934 M. 508 67 M.L.J. 470.

(53) *Subbu v. Krishnamacharya*, 21 M.L.J. 159 11 I.C. (2)

(54) *Ravunni v. Thankanni*, 42 M. 789; 37 M.L.J. 157 10 L.W. 142 1919 M.W.N. 571; 52 I.C. 918; *Kala v. Umeta*, 17 I.C. 704; 23 M.L.J. 517

incurred them or his successor in management. But there is no presumption that a debt incurred by the Karnavan has been incurred on behalf and for the benefit or necessity of the family,⁵⁵ and the burden is on the creditor to show either that there was a real necessity for the loan or that he made reasonable and *bona fide* enquiries and satisfied himself that such necessity existed before making the loan. If the creditor is able to show that such a necessity in fact existed or that he made reasonable enquiries which made him believe that the loan was necessary under the circumstances, his interests would be protected and the debt would be binding on the whole tarwad. The same principles apply even in the case of alienations of tarwad property by the Karnavan.⁵⁶ There are a number of cases taking the view—and this is given statutory recognition by the Marmakkattayam Act of 1933—that in the case of permanent alienations by the Karnavan, they would be valid and binding on the tarwad only if all the adult Anandravans consented to the alienation.⁵⁷ But there are also cases taking the view, which, it is submitted, is the more reasonable view to take, that the consent of the Anandravans is necessary only for the purposes of strengthening the evidence and probalising the case of necessity and is not really a condition precedent to the validity of the alienation if otherwise it is justified and supported by legal necessity.⁵⁸ The powers of the Karnavan having been declared by the decisions to be at least as large as those of the manager of a Mitakshara joint family⁵⁹ it is but proper that the conditions of validity laid down by the Privy Council in respect of an alienation by the manager of a Hindu Mitakshara family should not be added to. Even assuming that the view that for a permanent alienation like a sale or permanent lease the Anandravans must consent to the alienation is correct, cases have laid down that the consent need not be in writing⁶⁰ and a capricious or factious dissent of particular members to an alienation otherwise justified must be disregarded.⁶¹ But where by the terms of the Karar, the Karnavan has divested himself of the powers of alienation or raising debts, he has no power to bind the tarwad by a loan raised subsequently.⁶² But an unauthorised alienation by a Karnavan is not absolutely void but only voidable.⁶³ As regards movables, a Karnavan has absolute power to sell and convert them into money, such movables including decrees and debts and the alienee need not see to the application of the money nor need he enquire into the existence of necessity.⁶⁴ A junior member of the tarwad cannot pledge the tarwad credit or raise a loan or make an

(55) *Rama v. Krishnan*, 1926 M. 398, 23 L.W. 186, *Kesavan v. Lakshmi*, 48 L.W. 803, 1938 M.W.N. 1136; 1939 M. 137. (The concurrence of the seniormost Anandravan raises a *prima facie* presumption of necessity.)

(56) *Karnan v. Kunhi Kolandan*, 2 L.W. 941, 31 I.C. 184, 1915 14.W.N. 793.

(57) *Raman v. Raman*, 27 I.A. 231, 24 M. 73, 4 G.W.N. 310, 10 M.L.J. 245, *Varanaket v. Varanaket*, 2 M. 328.

(58) *Koran v. Chanda*, 3 M.H.C.R. 204, *Tod v. Kunhamod*, 3 M. 174, *Krishnan v. Gopandan*, 14 L.W. 539, 1921 M. 677, 41 M.L.J. 381, 1921 M.W.N. 715.

(59) *Krishna v. Kallian*, 18 L.W. 203, 1923 M. 780, 45 M.L.J. 258, 1923 M.W.N. 807; *Chethukutti v. Komappen*, 35 M.L.J. 380, 1918 M.W.N. 144, 44 I.C. 572, *Kunhamod v. Kutiah*, 3 M. 169, *Tod v. Kunhamod*, supra; *Kesavan v. Lakshmi*, supra. See also *Ananta v. Padmanabha*, 1938 M.W.N. 51, (1938) 1 M.L.J. 79, 47 L.W. 679; 1938 M. 468, where the test of prudential and honest exercise of discretion is laid down.

(60) *Koran v. Chanda*, supra.

(61) *Kalliyani v. Narayanan*, 9 M. 266.

(62) *Mooli v. Komappen*, 125 I.C. 651, 1930 M. 820, *Rama v. Krishna*, sup.

(63) *Janaki v. Chinandan*, 1925 M. 990, 22 L.W. 113.

(64) *Subramanis v. Krishna*, 12 L.W. 361, 60 I.C. 77, 39 M.L.J. 590.

alienation which will normally bind the tarwad. The only circumstances when a loan raised by the Anandran will bind the tarwad are (i) when the Anandran was refused maintenance by the Karnavan and the Anandran has to raise the necessary moneys for his maintenance; and (ii) when the Anandran has to raise a loan for expenses of litigation for recovering the property improperly alienated by the Karnavan.

649 Preservation of property—Though ordinarily it is the Karnavan that must look to the management and conservation of the family property, the Anandravans by virtue of their proprietary interest in the tarwad assets are entitled to see that the tarwad property is not wasted or otherwise improperly dealt with. Thus if the Karnavan is guilty of fraud,⁶⁵ or misappropriation or is grossly negligent in respect of the tarwad interests or is incompetent to manage the property,⁶⁶ by reason of old age⁶⁷ or bodily⁶⁸ or mental⁶⁹ defect or disease the Anandravans are entitled to institute a suit for his removal, and on his removal the then seniormost Anandran assumes the Karnavanship. Any improper alienation of the tarwad property can be set aside by a suit at the instance of the Anandravans,⁷⁰ and if the Anandravans smell collusion or fraud, they can intervene and claim to be impleaded in legal proceedings instituted by or against the Karnavan on behalf of the tarwad.⁷¹ The expenses incurred in connection with such proceedings can be recovered from the tarwad funds either by the Anandravans who incurred them or by the creditors who advanced the amounts, provided the litigation in which they were incurred proved successful.⁷² Another means of exercising a check on an imprudent Karnavan is by imposing restraints upon his powers by a family Karar, which will be binding not only upon him but even on those who are transferees from him of the tarwad properties with notice of the Karar.⁷³ As incidental to their right of preserving the common property, the Anandravans can maintain a suit for injunction to restrain the Karnavan from a contemplated unauthorised alienation or any other act prejudicial to the interests of the tarwad,⁷⁴ but a suit for a mandatory injunction against the Karnavan is not maintainable.⁷⁵ Any suit instituted by the Anandravans in respect of the Karnavan's act whether it be a suit for setting aside the Karnavan's alienation or for restraining an alienation by him, is a representative suit and must be brought

(65) *Thimmakke v. Akku*, 34 M. 481. 7 I.C. 153 1910 M.W.N. 293; *Kunhaman v. Thimmaya* 27 M.L.J. 60-24 I.C. 246, *Sankara v. Rama*, 50 L.W. 375 (1939) 2 M.L.J. 506-1939 M.W.N. 832 1939 M. 902

(66) *Vennukot v. Vennakot*, 2 M. 328

(67) *Kunhamma v. Thimmaya*, supra

(68) *Kannan v. Kannan*, 12 M. 307

(69) *Govindan v. Narayana*, 23 M.L.J. 706 17 I.C. 473 1913 M.W.N. 79.

(70) *Mahammad v. Kunthakutti*, 1929 M. 451 1928 M.W.N. 367, *Sooji v. Upputhamma*, 33 M. 31: 5 I.C. 698, *Modem v. Krishnan*, 10 M. 322.

(71) *Anantan v. Sankaran*, 14 M. 101, *Kanju v. Amma*, 34 L.W. 548 1932 M. 31 61 M.L.J. 549, *Ambe v. Kelan*, 46 L.W. 375 1937 M.W.N. 1001 1937 M. 843 where an appeal filed by the Anandravans against a decree given adverse to the tarwad represented by the Karnavan was held competent. *Manavejan v. Narayana*, 1939 M.W.N. 458: 1939 M. 751

(72) *Ali Raja v. Kanji Kannan*, 29 M.L.J. 633

(73) *Rama v. Kombe*, 8 M. 381, *Kombe v. Lakshmi*, 5 M. 101.

(74) *Puzhako v. Mahadran*, 35 M.L.J. 96-47 I.C. 778.

(75) *Narayanan v. Narayana*, 32 M.L.J. 489: 39 I.C. 46 (2) 1917 M.W.N. 222.

on behalf of the whole tarwad making all the Anandravans,⁷⁶ except minors,⁷⁷ parties to the suit. But on the recovery of the property for the tarwad, the management of the recovered property reverts to the management of the Karnavan who has alienated,⁷⁸ unless he has been previously removed from Karnavanship. Where there are already decrees against the Karnavan, they will be binding on the tarwad if they were obtained against the Karnavan in his representative capacity,⁷⁹ and there has been no fraud or collusion on the part of the Karnavan.⁸⁰ But if the decrees are the result of fraud or collusion or even wilful negligence or breach of duty of the Karnavan in respect of tarwad interests, the decrees are liable to be set aside by the Anandravans as not binding on the tarwad,⁸¹ the onus of proving such invalidating circumstances being upon the Anandravans.⁸²

650 Marriage.—Independently of any legislative enactment, the law of Malabar does not recognise marriage as a legal institution, the relation being in truth not marriage, but a state of concubinage into which the woman enters of her own free choice and is at liberty to change it when and as often as she please. The offspring of such a connection would be entitled to an order for maintenance under section 488 of the Code of Criminal Procedure of 1898 only if and when the mother's tavazhi or tarwad is unable to maintain them.⁸³ The forms of such unions usually called sambandhams vary according to the custom of the locality or community, but owing to the general feeling against polyandry, of which they are the modern survivals and considering the expediency of enabling "persons following the Marumakkattayam or the Alivasantana law of inheritance to contract marriages which shall be recognised by Courts of law as legal marriages and to provide for the issue of such marriages" the Malabar Marriage Act (Madras Act VI of 1896) was passed allowing registration of marriages, but so far as the people following the Marumakkattayam law are concerned, the said Act has been superseded by the provisions of the Madras Marumakkattayam Act, 1933, Sections 4 to 12 of Act XXII of 1933) printed at the end of this Chapter.

THE MALABAR MARRIAGE ACT, 1896

Act No. VI of 1896

An Act to provide a form of marriage for persons following the Marumakkattayam or the Alivasantana Law

Preamble

Whereas it is expedient to enable persons following the Marumakkattayam or the Alivasantana Law of Inheritance to contract marriages which shall be recognised by Courts of law as legal marriages, and to provide for the issue of such marriages: It is hereby enacted as follows:

- (76) *Jyari v Putamma*, 14 M 38
- (77) *Kunhan v Sankara*, 14 M 78.
- (78) *Rama v Sekhara*, 21 M L J 87 61 C 268; 1910 M W N 123
- (79) *Mathu v. Parameswaran*, 30 M 214 17 M L J 127.
- (80) *Kunju v Ammu*, 1932 M 31 34 L W 548 61 M 549.
- (81) *Tenju v Chimmu*, 7 M 413; *Narayana v Sankunni*, 1936 M W N. 937 43 L W 623 71 M L J 545 1936 M 861
- (82) *Tayarappa v Kamaran*, 8 L W 154 45 I C 489 34 M L J 51
- (83) *Raman v Parathu*, 38 L W 587 65 M L J 629, 1933 M W N 1276 1933 M 794; *Bharata Iyer* In re, 1924 M 549; 19 L W. 275. 46 M L J. 324 1924 M W N. 303; *Chamban v Mathu*, 39 M 957 (1916) 1 M L W N 111 32 I C 144; *Thilamma v. Sankunni*, 52 I. C. 893; 10 L W 229 1919 M W N 632 37 M L J 361

Title and application

1 This Act may be called the *Malabar Marriage Act, 1896*, and it shall be applicable to all Hindus domiciled in the *Prondan* of *Madras* following the *Marumakkattayam* or the *Alyasanthana Law of Inheritance*

Definitions

2 In this Act, unless there is something repugnant in the subject or context,—

‘Sambandham’.

‘Sambandham,’ means an alliance between a man and a woman by reason of which they in accordance with the custom of the community to which they belong or either of them belongs cohabit or intend to cohabit as husband and wife

“Children”

“Children” means sons and daughters of parents whose Sambandham has been registered as a marriage under this Act whether born before or after such registration, but shall not include, step-sons or step-daughters. In the case of any one whose personal law permits adoption “children” shall include adopted sons and daughters.

“Marriage”

“Marriage” with its grammatical variations and cognate expressions, means, except in section 3, clause (a), the last word of section 3, clause (c), section 15, clause (a) and the last word of section 15 clause (c) a Sambandham registered under the provisions of this Act.

“Tarwad”.

“Tarwad” means and includes all the members of a joint family with community of property governed by the *Marumakkattayam* or the *Alyasanthana Law of Inheritance*

Conditions subject to which a Sambandham may be registered as a marriage

3 A Sambandham between Hindus both or either of whom follow the *Marumakkattayam* or the *Alyasanthana Law of Inheritance* may be considered under this Act as hereinafter provided subject to the following conditions:—

(a) neither party must be subject to a personal law of marriage according to which he or she, as the case may be, cannot validly contract a marriage with the other party,

(b) the relation of the parties must not be such in respect of consanguinity or affinity that a Sambandham between them is prohibited by any custom or usage applicable to the community to which they belong or either of them belongs,

(c) neither party must at the date of the notice under section 5 have a husband or wife living whose Sambandham with her or him has been registered under this Act and which marriage is not null and void under section 15 or with whom she or he is otherwise legally married,

(d) the parties must not belong to different communities between the members of which, according to the custom or usage applicable to either community cohabitation is prohibited,

(e) the Sambandham must have been formed in accordance with the customary ceremonies, if any prevailing in the community to which they belong or either of them belongs,

(f) a party to a Sambandham who is a minor must have obtained the consent of his or her legal guardian to the registration of the Sambandham as a marriage

Appointment of Marriage Registrars

4 The Local Government may appoint one or more Registrars under this Act, either by name or as holding any office for the time being, for any portion of the territory subject to its administration. The officer so appointed shall be called “Registrar of Marriages under the *Malabar Marriage Act, 1896*,” and is hereinafter referred to as “the Registrar.” The portion of territory for which any such officer is appointed shall be deemed his district

REGISTRATION**Notice of intentions to register a Sambandham to be given to the Registrar.**

5 When it is intended to register a marriage under this Act, both or either of the parties shall give notice in the form (A) to this Act annexed to the Registrar within whose local jurisdiction either of the parties resided at the time when the Sambandham was formed or within whose local jurisdiction it is intended to form it

Registrar to file such notices and to maintain the "Marriage Notice Book"

6 *The Registrar shall file all such notices and keep them with the records of his office and shall also forthwith enter a true copy of all such notices fairly into a book to be for that purpose supplied to him by the Local Government and to be called "The Marriage Notice Book" Such book shall be open at all reasonable times without fee to all persons desirous of inspecting the same*

Copies of notice to be served on interested parties

7. (1) *Every Registrar shall, on receiving any such notice, forthwith cause a copy thereof to be affixed to a notice board in some conspicuous place in his office, and shall then serve or cause to be served at the expense of the party giving such notice a copy thereof on the other party to the Sambandham, if both parties have not joined in giving such notice, on the guardians, if any, of the parties thereto, and on the managing members of the Tarwads or families to which they respectively belong.*

Withdrawal of notice

(2) *If at any time before registration is effected the party by whom notice was given under section 5 signifies in writing to the Registrar that the withdraws such notice the Registrar shall, thereupon, at the expense of the party withdrawing the same, communicate the fact of withdrawal to the persons mentioned in sub-section (1)*

Persons entitled to object to registration of a Sambandham

8 (1) *Any person entitled to receive a notice under sub-section (1) of section 7, any member of the Tarwad or family of either party, or any person having any expectancy of succession to the property, if any of such Tarwad or family of either party may, within one month from the date of such service of notice, object to such registration on the ground that such Sambandham or registration is in contravention of the conditions prescribed in section 3*

Procedure of Registrar if objection is taken

(2) *Such objection shall be in writing signed by the person objecting and shall be presented by the objector or his duly authorised agent to the Registrar who shall file the same in his office. A copy of such objections shall at the expense of the objector be served on the party by whom notice was given under section 5*

(3) *On receipt of a notice of objection made under sub-section (1) the Registrar shall not proceed to register the Sambandham as a marriage until the expiry of four months from the receipt of such notice unless such notice is in the meantime withdrawn*

Procedure if no objection is taken

(4) *If no such objection be made under this section and if neither party withdraws the notice under section 7 sub-section (2) such Sambandham may at any time, not being less than one month and nor more than six months from the service of the notice under section 7, be registered as a marriage*

Person objecting may file a suit in civil Court.

9 *Any person objecting to the intended registration of a Sambandham may, after complying with the provisions of section 8, file a suit in a competent civil Court for declaratory decree declaring that such registration would contravene one or more of the conditions prescribed in section 3*

Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with Registrar.

10 *The Judge before whom such suit is instituted shall thereupon give the person instituting the same a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within four months from the receipt of notice of objection, the Sambandham shall not be registered as a marriage under this Act till the decision of such Court has been given and the period allowed by law for appeals from such decision has elapsed, or, if there be appeal from such decision, till the decision of the Appellate Court has been given or such suit or appeal has been withdrawn or dismissed for default*

If such certificate be not lodged within the period prescribed in the last preceding paragraph, or if the suit by the objector be finally dismissed or withdrawn, the Sambandham may be registered as a marriage

Declaration to be signed before registration.

11 Before a Sambandham is registered as a marriage, the parties thereto and three witnesses shall, in the presence of the Registrar, sign a declaration in the form (B) to this Act annexed. If either party is a minor, the declaration shall also be signed by his or her legal guardian, and in every case it shall be countersigned by the Registrar.

Registrar to enter certificate of marriage in the Marriage Certificate Book

12 When such a declaration has been made, the Registrar shall enter a certificate of marriage, in a book to be for that purpose supplied to him by the Local Government and to be called "The Marriage Certificate Book" in the form (C) to this Act annexed, and such certificate shall be signed by the Registrar and countersigned by the parties, three witnesses and if either party is a minor, by his or her guardian also.

Registration at a private residence.

13 Subject to such rules as may be prescribed in that behalf by the Local Government, the Registrar may attend at the private residence of the parties or of the guardian of a party who is a minor for the purpose of such declaration and marriage certificate book being signed by them in his presence.

Fees payable to Registrar.

14 The Local Government shall prescribe the fees payable for the duties to be discharged by the Registrar under this Act.

The Registrar may demand payment of any such fee before the registration of the Sambandham or performance of any other duty in respect of which, it is payable.

The said marriage certificate book shall, at all reasonable times be open for inspection. The Registrar shall furnish certified extracts from the marriage certificate book upon payment of the fee prescribed by the Local Government therefor, and such extracts shall be admissible as evidence of the due registration as marriage of the Sambandham therein mentioned.

Marriage when null and void.

15 (1) A marriage shall be null and void only—

(a) if either party is subject to personal law of marriage according to which he or she as the case may be, cannot validly contract a marriage with the other,

(b) if a relationship can be traced between the parties through some common ancestor, who stands to each of them in a nearer relationship than that of great-great-grandfather or great-great-grandmother, and by reason of such relationship a Sambandham between them is prohibited by any custom or usage applicable to the community to which they belong or either of them belongs,

(c) if either party has a husband or wife living whose Sambandham with such party has been registered as a marriage under this Act and such marriage is not null and void under clauses (a), and (b) of sub-section (1) or with whom she or he has been otherwise legally married.

(2) A marriage shall not be invalid on the ground that the Sambandham or registration contravenes any of the grounds mentioned in section 3 other than those specified in clauses (a), (b) and (c) of sub-section (1).

Marriage not invalid by reason of irregularity in procedure

16 (1) No marriage under this Act shall be held invalid by reason of any irregularity in the giving of notice under section 5 or of failure to give notice under section 7 to any person entitled to receive it¹⁷ or by reason of any irregularity in the publication or service of the copy of such notice or in complying with the provisions of sections 5, 11 and 12.

(2) But when any person entitled to be served with copy of notice under section 7 has not been so served, it shall be competent to him to institute a suit within three months from the date of registration of the Sambandham for cancellation of such registration on all or any of the grounds mentioned in section 3.

MAINTENANCE**Maintenance of wife and children**

17 (1) The wife and children shall be entitled to be maintained by the husband or father, as the case may be. In a civil suit by the wife or children for maintenance it shall be open to the husband or father to plead all defences to such a suit as a Hindu governed by the ordinary Hindu Law.

(2) *Nothing herein contained shall affect the right of the wife and children to be maintained by the Tarwad.*

GUARDIANSHIP

Guardianship of minor wife and children

18 *When a man's wife and children are minors maintained by him or his Tarwad, he shall, subject to the provision of the Guardians and Wards Act, 1890, be the guardian of his wife when she is over fourteen years of age and of his children. Provided that such guardianship shall not extend to the right and interest of his wife or children in the property of the Tarwad to which his wife and children belong.*

DIVORCE

Petition for dissolution of marriage.

19 *A husband and wife or either of them may present a petition for dissolution of the marriage in the Court of the District Munsif within the local limits of whose jurisdiction either the husband or wife, or in cases in which one of them alone is petitioner, the respondent has a permanent dwelling or actually and voluntarily resides or carries on business or personally works for gain at the time when the petition is presented.*

Explanation—For the purposes of this section the Madras City Civil Court shall be deemed to be the Court of the District Munsif in respect of the area within the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Madras.

Notice to be given to other party if petition is not joint.

20 *A copy of such application when made by one party alone shall be served on the other party to the marriage at the expenses of the petitioner.*

Court to declare marriage dissolved on motion made within a specified period.

21 *Six months after the presentation of a petition by both parties, or in cases where the application is made by one party alone six months after the service of notice under section 20, the Court shall, on the motion of the applicants or applicant declare in writing the marriage dissolved.*

Provided that such motion is made within seven days after the expiration of the six months or, if the Court is closed then that such motion is made on the day on which the Court is re-opened. Upon such declaration the marriage shall be deemed dissolved from the date of such declaration, and no declaration made under this section shall be held invalid by reason of any irregularity in complying with the provisions of sections 19, 20 and 21. If no such motion is made within the time hereinbefore prescribed, the Court shall dismiss the petition.

Maintenance when claimable by divorced wife

22 *Where a marriage has been dissolved without the consent of the wife, she shall notwithstanding such dissolution be entitled to claim maintenance from the husband so long as she remains a Hindu, continues chaste, and does not form a Sambandham or contract a marriage.*

Provided that she was not guilty of adultery uncondoned before such dissolution
Succession to separate property of a married man dying intestate.

23 *Where a man following the Marumakkattayam or the Aliyasantana Law of Inheritance dies intestate in respect of his self acquired or separate property or any portion thereof, one half of such property or in the event of no member of his Tarwad surviving him the whole of such property shall devolve on his widow if he leaves no children, or on his children in equal shares if he leaves no widow, or on his widow and children in equal shares if he leaves both widow and children.*
Succession to separate property of a married woman dying intestate

24 *Where a woman following the Marumakkattayam or the Aliyasantana Law of Inheritance dies intestate in respect of her separate or self acquired property or any portion thereof, one-half of such property shall devolve in equal shares upon her children and, in the event of no member of the Tarwad surviving her, the whole of such property shall devolve on her husband.*

Service of notice under this Act.

25 *Copies of notices under sub-section (1) of section 7, notice of withdrawal under sub-section (2) of section 7, offers of objection under sub-section (2) of section 8 shall be served through such officer or Court as the Local Government may direct in this behalf and the law in force for the time being for the service of summons on a defendant in a civil suit shall apply to such service.*

FORM A

(Section 5)

To

NOTICE OF MARRIAGE

—, a Registrar of Marriages under Act
the District of

I hereby give you notice that I intend registering as a marriage under Act
the Sambandham between me and the other party herein named and described —

Name	Names of Tarwad and of the managing member thereof	Names of the Legal guardians (if any)	Rank or profession or calling	Resi- dence	Age	Caste	The place in which the Sam- bandham was formed or is intend- ed to be.
------	---	--	-------------------------------------	----------------	-----	-------	--

A B

C D.

Witnes my hand, this

day of

189

FORM B

(Section 11)

DECLARATION TO BE MADE SEPARATELY BY THE BRIDEGROOM AND BY THE BRIDE

I, A B, hereby declare as follows —

- (1) I am a Hindu governed by the Law of Inheritance.
 (2) I am years of age
 (3) The registration of my Sambandham with will not contravene
 any of the conditions prescribed in section 3 of Act
 (4) I consent to the registration as a marriage of the Sambandham between me and C D, (or, if the
 party making the declaration, is a minor (4) My legal guardian consents to the registration as a marriage of the
 Sambandham between me and C D)

(5) I am aware that, if any statement in this declaration is false and if in making such statement I either
 know or believe it to be false or do not believe it to be true, I am liable to imprisonment and fine

(Signed) G.H. }
 „ I J } Three witnesses
 „ K L }

(Sd.) A B (the Bridegroom or Bride)
 (A B) E.F. (Guardian, if any)
 (Counter-signed) M N
 Registrar of Marriages under Act for
 the District of

FORM C

(Section 12)

MARRIAGE CERTIFICATE

I, E.F., certify that, on the of 189, appeared
 before me A.B. and C.D., each of whom in my presence and in the presence of three witnesses, whose names
 are signed hereunder, made the declarations required by Act
 and that the Sambandham between them was registered as a marriage under the said Act in my presence.

(Signed) E.F.,
 Registrar of Marriages under Act
 for the District of

(Signed) G.H. }
 „ I J } Three witnesses
 „ K L }

(Signed) A B
 „ C.D.
 „ M.N. (Guardian)
 if any

Dated the

day,

189, of

651. Adoption.—Adoption is very rare occurrence in Malabar and is purely a secular act without any religious significance, undertaken to perpetuate a tarwad which has approached the brink of extinction. Usually the adoption is made of a girl, for the adoption of a boy does not serve this purpose as his descendants cannot become members of a tarwad for purposes of perpetuating it. But there is no objection to the adoption of a male⁸⁴ nor to the number of persons adopted⁸⁵ or to the age of the adoptee⁸⁶ or adoptees. But an adoption can never be made to a member or branch of a tarwad but to the tarwad as a whole,⁸⁷ and though it is made by the Karnavan of the tarwad it can be made only after consulting all the members of the tarwad⁸⁷. Where the adoption is made only of a member or some of the members of another tarwad, the adoptees lose their rights in the tarwad of their birth, but if all the members of a tarwad are adopted, the adoptees do not lose the properties of that tarwad but continue to hold them as their separate properties distinct from the properties of the adoptive tarwad⁸⁸.

652 Partition.—The presumption is that all joint property, is partible⁸⁹ but except when all the members of the tarwad consent there can be no partition of its properties⁹⁰. The consent of all the adult members of the tarwad is necessary, the respective senior most members of the different tavazhis of the tarwad, by themselves, cannot effect a division among the tavazhis⁹¹. If there are minors in the tarwad they have to be properly represented by other adult members and their interests protected. Otherwise on their attaining majority the partition is liable to be reopened⁹². When a partition does take place with the concurrent will of all the tarwad members, the question of what share is to be allotted to a particular branch or individual member of the tarwad can hardly arise because unless all the persons agree to the partition which means unless they agree not only to the property being divided but also in what shares it is to be divided, there cannot be a binding partition. Partition being opposed to the genius and spirit of the Malabar law any arrangement by way of partition is in the nature of a family arrangement or Karar and hence is subject to all the legal incidents of such a transaction. But it may be safely premised that every member of the tarwad being equally interested in the property⁹³ any partition arrangement should not be

(84) *Subramanya v. Parameswarar*, 11 M 116

(85) *Moore's Malabar Law*, page 33, S A. No 19 of 1874, *Kunja v. Ayyappan*, 9 Tr L R 100

(86) *Vallappu v. Paru*, 9 M L J 16

(87) *Raman Menon v. Raman Menon*, 24 M. 73 27 I A 231 10 M L J 245 4 C W. N. 310, *Chandu v. Subba*, 13 M 209

(88) *Velayudhan v. Ramaswami*, 7 Tr L R 664, See also *Machungal Sreeha v. Machungal Kelu*, 49 L W 581 (1939) 2 M L J 697 1939 M. 564, for a discussion of this question

(89) *Krishnan v. Ramanatha*, (1939) [2 M L J 718 1939 M W N 1087 50 L W 511 1940 M 67

(90) *Veluthakkal v. Kaloppan*, 31 M L J 789 34 I C 818, 1917 M. W. N 106

(91) *Kochukesaven v. Raman Padmanabhan*, 1976 Ker. 105

(92) *Supra*, *Narayani v. Achuthan*, 42 M 292 51 I C 101 36 M L J 529

(93) *Panga v. Unnikutti*, 24 M 275.

on the *stirpital* but on the *per capita* basis.⁹⁴ Thus if a tarwad consists of a brother and two sisters and the issue of the sisters, and one sister has 9 children and the other sister has 14, the property is to be divided into 26 shares, one share being allotted to the brother, ten shares to the tavazhi of the sister having nine children and fifteen shares to the tavazhi of the sister having fourteen children.⁹⁵ Now under the Madras Marumakkattayam Act of 1933, which however applies only to persons governed by the Marumakkattayam Law, it is not necessary that all members of the tarwad should consent for a valid partition; any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad and separate from it provided that if there is an ancestress common to that tavazhi and any other tavazhi of the tarwad her consent is obtained for such separation (Section 38 Madras Act XXII of 1933) and the share allotted to the tavazhi shall be on the *per capita* basis (Section 40 of Madras Act XXII of 1933). But conversion of a member of a tarwad to another religion entitles him to claim and the other members to compel him to take his or her share of the tarwad properties and separate from the tarwad (Section 39 of Act XXII of 1933).⁹⁶

653 Inheritance—Religious efficacy not being a ground of preference in succession among the people governed by the Marumakkattayam Law, the only test that ought to be applied to determine the preferential heir must be the test of propinquity or nearness of blood. But group succession being the rule among these people, the question arises whether when a person having separate property dies, his property should be taken by the tarwad of which he was a member or by the tavazhi to which he belonged. Applying the test of propinquity, it is the tavazhi that must succeed and not the whole tarwad.⁹⁷ But the Madras High Court has not been quite logical in its conclusions on this question and while it holds that the separate property of a female member would go to her tavazhi,⁹⁸ it says that of a male member would be taken by the tarwad⁹⁹ subject to the exception that if the property of the member has been acquired with the help of the tavazhi property, that property would be taken by the tavazhi.¹⁰⁰ When there are several tavazhis, they having separated from one another, on the extinction of a tavazhi by the death of its last member, the tavazi from which the extinct tavazhi separated last, succeeds to its properties in preference to others though more nearly connected with it by blood.¹⁰¹ This is yet another unwarranted exception to the rule of propinquity.

654 Will—Every person governed by the Marumakkattayam or the Aliyasantana Law of Inheritance, if of sound mind and not a minor, can dispose of his self-acquired or separate property by will under the provisions of the Malabar Wills Act V of 1898. Even property which once belonged to a tarwad may become the separate property of a person when he or she happens to be the last survivor of the tarwad. So also in the case of person

(94) *Sreedevi v Perumuri*, 40 L.W. 455 1935 M. 71 67 M.L.J. 671; 1934 M.W.N. 1210.

(95) But see *Pathumna v Raman Namthar*, 44 M. 891 14 L.W. 257 41 M.L.J. 243; 1921 M.W.N. 594 1921 M. 224 (F.B.)

(96) *Sakthi v Sakthi*, 24 Tr. L.R. 102, *Manjappa v Marudeti*, 39 M. 12 30 M.L.J. 204 32 I.C. 165, a case under Aliyasantana Law.

(97) *Krishnan v Damedaran*, 38 M. 48 16 I.C. 769 24 M.L.J. 240.

(98) *Raman v Madhavam*, 1927 M. 244, *Govindan v Sankaran*, 32 M. 351 2 I.C. 183; 19 M.L.J. 350.

99: *Komu v Ittatha*, 10 M.L.J. 57.

(100) *Gopala v Raghava*, 21 L.W. 215 1925 M. 460, *Sankunni v Rama*, 1929 M. 346.

belonging exclusively to the tavazhi of a tarwad, the last surviving member of that tavazhi can dispose of that property by will, even though he belongs to a tarwad consisting of other members

THE MALABAR WILLS ACT, 1898

Act No V of 1898.

An Act to declare the testamentary power of persons governed by the Marumakkattayam or the Alivasantana Law of Inheritance and to provide rules for the execution, attestation, revocation and revival of the wills of such persons

Preamble

Whereas doubts have arisen regarding the testamentary power of persons governed by the Marumakkattayam or the Alivasantana Law of Inheritance, and whereas it is expedient to remove such doubts, and to provide rules for the execution, attestation, revocation and revival of the wills of such persons, it is hereby enacted as follows

PART I

PRELIMINARY

Short title

- 1 (1) *This Act may be called "the Malabar Will Act, 1898"*

Local extent

- (2) *It extends to the whole of the Presidency of Madras, and*

Commencement

- (3) *It shall come into force on such date as the Local Government by notification shall appoint in this behalf*

Provided that nothing in this Act shall be deemed to affect the Hindu Wills Act, 1870

Interpretation clause

- 2 *In this Act unless there be something repugnant in the subject or context—*

"Minor"

- (1) *'minor' means any person who shall not have completed the age of eighteen years*

(2) *'Will' means any legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death,*

"Codicil"

(3) *"Codicil" means an instrument made in relation to a will and explaining, altering or adding to its dispositions It is considered as forming an additional part of the will*

PART II

OF WILLS

Persons to whom this Part shall apply

3 *This Part shall apply to persons domiciled in the Presidency of Madras who are governed by the Marumakkattayam or the Alivasantana Law of Inheritance*

Persons capable of making wills.

4 *Every person of sound mind and not a minor may by will dispose of property which he could legally alienate by gift inter vivos and shall be deemed to have been always competent so to dispose of such property*

Explanation 1—Persons who are deaf or dumb or blind are not thereby incapacitated for making a will, if they are able to know what they do by it

Explanation II—One who is ordinarily insane may make a will during an interval in which he is of sound mind

Explanation III—No person can make a will while he is in such a state of mind whether arising from drunkenness or from illness or from any other cause that he does not know what he is doing

Will obtained by fraud, coercion or importunity

5 Will or any part of a will, the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator, is void

Will may be revoked or altered

6 A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will

7 Nothing contained in section 4 shall—

(a) affect any right established before the commencement of this Act by a final decree of a Court of a competent jurisdiction,

(b) authorize a testator to deprive any person of any right of maintenance of which, but for section 4, he could not deprive them by will,

(c) affect any law of intestate succession or authorize any testator to create in property any interest which he could not have created prior to this Act

PART III

OF THE EXECUTION, ATTESTATION, REVOCATION, ALTERATION AND

REVIVAL OF WILLS

Person to whom this part shall apply

8 This Part shall apply to persons governed by the Marumakkattayam or Aliyasantana Law of Inheritance, whether they are domiciled in the Presidency of Madras or not

Execution of Wills and Codicils

9 All wills and codicils made on or after the date of the commencement of this Act within the Presidency of Madras, and all such wills and codicils made outside the said Presidency so far as relate to immovable property situated within the said Presidency, must be executed according to the following rules

First—The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction

Second—The signature or mark of the testator, or the signature of the person signing for him shall be placed that it shall appear that it was intended thereby to give effect to the writing as a will

Third—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary

Incorporation of papers by reference

10 If a testator in a will or codicil duly attested, refers to any other document then actually written as expressing any part of his intentions, such documents shall be considered as forming a part of the will or codicil in which it is referred to

Witness not disqualified by interest or by being executor.

11. No person by reason of interest in or of his being an executor of a will, is disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof

Revocation of will or codicil.

12 No will or codicil, nor any part thereof, shall be revoked otherwise than by another will or codicil, or by some writing declaration on intention to revoke the same and executed in the manner in which a will is heretofore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence, and by his direction with the intention of revoking the same.

Effect of obliteration, interlineation or alteration in a will

13 Any obliteration, interlineation or other alteration made in any will after the execution thereof shall have no effect except so far as the words or meaning of the will shall have been thereby rendered illegible or undecipherable, unless such alteration shall be executed in like manner as heretofore is required for the execution of the will, and the will as so altered shall be deemed to be executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or apposite to a memorandum referring to such alteration, and written at the end of some other part of the will.

Revival of a will or codicil

14 No will or codicil, nor any part thereof which shall be in any manner revoked shall be revoked otherwise than by the re-execution thereof, or by a codicil executed in manner heretofore required and showing an intention to revive the same, and when any will or codicil, which shall be partly revoked and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof unless an intention to the contrary shall be shown by the will or codicil.

Execution and revocation of will or codicil by soldiers or mariners

15 No will or codicil made by a soldier employed in an expedition or engaged in actual warfare or by a mariner, at sea and no revocation by such person of his will or codicil shall be deemed invalid by reason only of such will, codicil or revocation not being made in accordance with the provisions of this Part.

THE MADRAS MARUMAKKATTAYAM ACT, 1933

Act No. XXII of 1933

[Received the assent of the Governor on 21st March 1933 and of the Governor-General on the 12th April, 1933]

An Act to define and amend in certain respects the law relating to marriage, guardianship, intestate succession, family management and partition applicable to persons governed by the Marumakkattayam Law of Inheritance.

Whereas it is expedient to define and amend in certain respects the law relating to marriage, guardianship, intestate succession, family management and partition applicable to persons governed by the Marumakkattayam Law of Inheritance, and whereas the previous sanction of the Governor-General has been obtained to the passing of this Act,

It is hereby enacted as follows:—

CHAPTER I**PRELIMINARY****Short title and application**

1 This Act may be called "The Madras Marumakkattayam Act, 1932"

2 It shall apply—

- (a) to all Hindus in the Presidency of Madras who are governed by the Marumakkattayam Law of Inheritance,
- (b) to all Hindus outside the said Presidency governed by the said law in respect of properties within it, and
- (c) to all Hindu males whether governed by the said law or not, who have contracted or may contract marital alliances with Hindu females governed by the said law.

Repeal of Madras Act (IV of 1896).

2 The Malabar Marriage Act, 1896, in so far as it is applicable to Hindus following the Marumakkattayam Law of Inheritance, is hereby repealed.

Definitions.

3 In this Act, unless there is anything repugnant in the subject or context—

- (a) 'anaravanan' means any member of a tarwad other than the karnavan,
- (b) 'Collector' means the Collector of Malabar or South Kanara, as the case may be, and includes any Revenue Divisional Officer who is authorized by the Collector to perform his functions under this Act,
- (c) 'Karnavan' means the oldest male member of tarwad, or tavazhi, as the case may be, in whom the right to management of its properties vests, or in the absence of a male member the oldest female member or where by custom or family usage the right to such management vests in the oldest female member, such female member,
- (d) 'major' means a person who has attained eighteen years of age,
- (e) 'marumakkattayam' means the system of inheritance in which descent is traced in the female line but does not include the system of inheritance known as the Aliasantana,
- (f) 'marumakkattayi' means a person governed by the Marumakkattayam Law of Inheritance,
- (g) 'minor' means a person who has not attained eighteen years of age,
- (h) 'prescribed' means prescribed by rules made under this Act,
- (i) 'tarwad' means the group of person forming a joint family with community of property governed by the Marumakkattayam Law of Inheritance,
- (j) 'tavazhi' used in relation to female means the group of persons consisting of that female, her children and all her descendants in the female line, and
- (k) 'tavazhi' used in relation to a male means the tavazhi of the mother of that male

CHAPTER II**MARRIAGE AND ITS DISSOLUTION****Marriages valid under the Act.**

4 (1) Save as provided in section 5, the conjugal union of a Marumakkattayi female with—

(i) a male belonging to the same community as such female, or

(ii) a male, not belonging to such community and whether a marumakkattayi or not, shall be deemed for all purposes to be a legal marriage if—

(1) the parties to the union are not related to each other in such degree of consanguinity or affinity that conjugal union between them is prohibited by any custom or usage of the community to which they belong or either of them belongs, and

(b) the union—

(i) was openly solemnized in accordance with the customary ceremonies, if any prevailing in the community to which the parties belong or either of them belongs, before the date on which this Act comes into force and is subsisting on such date or,

(ii) is so solemnized in accordance with such ceremonies on or after the date on which this Act comes into force and, whether or not the parties are minors, with the consent of the guardian or guardians of such minor or minors, or

(iii) was registered as a marriage under the Malabar Marriage Act, 1896 before the date on which this Act comes into force and is subsisting on such date

(2) A conjugal union between minors or between a minor and a major which would otherwise be a valid marriage under sub-section (1) shall not be deemed to be invalid merely on the ground that the consent of the guardians or guardian of such minors or minor was not obtained to the union

(3) Notice of every marriage contracted on or after the date on which this Act comes into force shall be given by such person, to such authority, in such form and within such time as may be prescribed. Failure to give such notice shall be punishable with fine which may extend to fifty rupees but such failure shall not invalidate the marriage or affect the legal rights of the parties to or the issue of such marriage

Marriage during continuance of prior marriage void.

5 (1) *During the continuance of a prior marriage which is valid under section 4, any marriage contracted by either of the parties thereto on or after the date on which this Act comes into force shall be void*

(2) *On or after the said date, any marriage if contracted by a male with a Marumakkattay female, during the continuance of a prior marriage of such male, shall be void, notwithstanding that his personal law permits of polygamy*

Note.—In the case of a female governed by the Marumakkattayam Law as modified by this Act, any marriage contracted by her with a Hindu male during the continuance of a prior marriage of such male is void under this section, notwithstanding that his personal law permits of polygamy, and such a marriage cannot be held to be valid merely because at the time of the marriage the Marumakkattay female had made a declaration that she had renounced her "personal law" 1301.

Dissolution of marriage

6. *A marriage valid under section 4 may be dissolved —*

- (a) *by a registered instrument of dissolution executed by the parties thereto, or*
- (b) *by an order of dissolution as hereinafter provided*

Provided that if either or both the parties is or are minors, the marriage shall not be dissolved until after the party has become a major or both the parties have become majors, as the case may be

Petition for dissolution.

7 (1) *A husband or wife may present a petition for dissolution of marriage—*

(i) *if the place where the marriage was contracted or the respondent has a permanent dwelling or actually and voluntarily resides or carries on business or personally works for gain at the time, the petition is presented is situated within the local limits of the jurisdiction of the Court of a District Munsif, in such Court*

(ii) *If such place is not situated within the local limits of the jurisdiction of the Court of any District Munsif, in the Court of the Subordinate Judge or if there is no such Court in the Court of the District Judge, within the local limits of whose jurisdiction such place is situated, and*

(iii) *if such place is situated within the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Madras, in the Madras City Civil Court*

(2) *The petition shall specify the place where and the date on which the marriage was contracted and if the respondent was a minor at the time of the marriage, the name, and address of the guardian, if any, with whose consent the marriage was contracted*

Service of copy of petition on respondent.

8 *A copy of such petition shall be served at the expense of the petitioner on the respondent*

Order of dissolution

9 *On the motion of the petitioner made not earlier than six months after the service of the copy as aforesaid, if the petition is not withdrawn in the meantime, the Court shall on being satisfied after such inquiry as it thinks fit that a marriage which is valid under section 4 was contracted between the parties by order in writing, declare the marriage dissolved. The dissolution shall take effect from the date of such order*

Application of the Code of Civil Procedure, 1908 to petitions

10 *The provisions in the Code of Civil Procedure, 1908, shall so far as may be, apply to petitions under this Chapter*

Bar of suit for restitution of conjugal rights.

11 *No Court shall entertain a suit for restitution of conjugal rights between the parties to a marriage valid under section 4*

Chapter not to apply to marriages of Nambudri

12 *Nothing contained in this Chapter shall apply to the marriage of any Nambudri woman following the Marumakkattayam Law of Inheritance*

CHAPTER III

MAINTENANCE AND GUARDIANSHIP

Maintenance of wife and minor children.

13 (1) *The wife and minor children other than married minor daughters under the guardianship of their husbands, shall be entitled to be maintained by the husband or the father, as the case may be.*

Provided that the wife shall not be entitled to maintenance from the husband if she refuses to live with him without just cause

(2) *Nothing contained in sub-section (1) shall affect the right of any person to maintenance from his or her tarwad or tarawhi properties*

(3) *In awarding maintenance under sub-section (1) the Court shall have due regard to the means and circumstances of the person against and by whom maintenance is claimed and to the reasonable wants of the person claiming maintenance*

Guardianship of minor wife and children

14 *The husband shall be the guardian of his minor wife in respect of her person and property and subject to the provisions of section 15, the father shall be guardian of his minor children other than married minor daughters under the guardianship of their husbands in respect of their person and property*

Provided that such guardianship shall not extend to the right and interest of the wife or children in respect of tarwad or tarawhi properties

Provided further that nothing contained in this section shall apply to a female member of any of the tarwads included in the schedule or her children, where such female member, resides in her own tarwad house and not with her husband

Guardianship of minor children by husband deceased or divorced

15 *The mother shall be the guardian of the person and property of her minor children if their father is dead or the marriage of their parents is dissolved*

Savings of the operation of the Guardians and Wards Act, 1890

16 *Nothing contained in sections 14 and 15 shall be deemed to affect the operations of the Guardians and Wards Act, 1890*

CHAPTER IV

INTESTATE SUCCESSION

Property as to which a person is considered to have died intestate.

17 *A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect*

Illustrations

(i) *A has left no will. He has died intestate in respect of the whole of his property*

(ii) *A has left a will whereby he has appointed B his executor but the will contains no other provisions. A has died intestate in respect of the distribution of his property*

(iii) *A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property*

(iv) *A bequeathed Rs. 1,000 to B and Rs. 1,000 to the eldest son of C and made no other bequest and died leaving Rs. 2,000. She died before A without ever having had a son. A has died intestate in respect of the distribution of Rs. 1,000*

Devolution of property left by marumakkattayi male intestate

18 *On the death intestate of a marumakkattayi male, his property which is self-acquired or separate, shall devolve in the order and according to the rules contained in sections 19, 20, 21, 22, 23 and 24*

Where intestate has left mother, widow, children and lineal descendants.

19 *Where the intestate has left surviving him a child or children, or a lineal descendant or descendants in the female line through deceased daughter or daughters, or both, and also his mother or a widow or widows or both his mother and a widow or*

widows, the whole of the property shall belong to them. In the absence of the mother and widow, the whole of the property shall belong to the child or children and such lineal descendants or dependants; and in the absence of the mother, widow and child, the whole of the property shall belong to such lineal descendant or dependants.

Note.—The words "child or children" in this section refer only to child or children of a marriage recognised by section 4 of the Act and not to the offspring of a union which is not a marriage within the meaning of that section.

Rules of distribution in cases falling under section 19.

20 The distribution of the property among the heirs referred to in section 19 shall be made in accordance with the following rules:—

- (i) The widow or, if there is more than one widow, each of the widows, shall be entitled to a share equal to that of a child.
- (ii) The mother shall be entitled to a share equal to that of a child.
- (iii) Every child (son or daughter) shall be entitled to an equal share.

Provided that if a daughter has predeceased the intestate, the lineal descendants of such daughter in the female line, shall be entitled to the share which such daughter would have taken had she survived the intestate.

(iv) Grand-children by a deceased daughter, shall be entitled in equal shares to what their mother would have taken had she survived the intestate.

Provided that if a grand-daughter has predeceased the intestate, the lineal descendants of such grand-daughter in the female line, shall be entitled to the share which such grand-daughter would have taken had she survived the intestate.

(v) In like manner the property shall go to the surviving lineal descendants of the intestate in the female line where such dependants are in the degree of great grand-children or in a more remote degree.

Explanation I.—The descendants of a daughter, daughter's daughter or other female descendant in the female line, shall not be entitled to any share in such property if such daughter, daughter's daughter or other descendant is alive at the time of the death of the intestate.

Explanation II.—The descendants of a son who has predeceased the intestate shall not be entitled to any share in such property.

Illustrations

(1) Z dies intestate leaving two widows A and B, his mother C, a son D, daughter E, a grand-daughter F by such daughter, the lineal descendants of a deceased daughter G and the lineal descendants of a deceased son T. A, B, C, D and E each gets one-sixth and the lineal descendants of G get one-sixth of the property. The grand-daughter F and the lineal descendants of T do not get any share.

(2) Z dies intestate leaving no widow or mother, but leaving A son, B a daughter, E and F a grandson and a grand-daughter by a deceased daughter C, and a grand-daughter G by a deceased daughter and two great-grand-daughters H and F by a deceased daughter D, A and B will each be entitled to one-fourth of Z's property, E and F will each be entitled to one-eighth, G will be entitled to one-eighth and H and F each to one-eighth.

(3) Z dies intestate leaving no mother, widow, or child, but leaving three grand-children A, B and C by a daughter X who has predeceased him and two grand-children D and E by a daughter Y who has also predeceased him. A, B and C will each be entitled to one-sixth, and D and E will each be entitled to one-fourth of Z's property.

Rules of distribution where intestate has left no child or lineal descendant but only mother or widow or both.

21 Where the intestate has not left surviving him any child or lineal descendant in the female line through a deceased daughter but has left his mother and a widow or widows, one-half of the property shall devolve on his mother and the other half on his widow or widows in equal shares. In the absence of a widow, the whole of the property shall belong to the mother.

Rules of distribution where intestate has left only widow or mother's *tavazhi* or both.

22 Where the intestate has not left surviving him his mother or any child or lineal descendant in the female line through a deceased daughter but has left a widow or widows and his mother's *tavazhi*, one-half of the property shall devolve on his widow or widows and

the other half on his mother's tazachi. In the absence of the mother's tazachi, the whole of the property shall belong to the widow or widows and in the absence of a widow the whole of the property shall belong to the mother's tazachi.

Rules of distribution where intestate has left only father and maternal grandmother's tazachi

23 *Where the intestate has not left surviving him any of the heirs mentioned in sections 19, 21 and 22 but has left his father and his maternal grandmother's tazachi, one-half of the property shall devolve on his father and the other half on his maternal grandmother's tazachi. In the absence of the maternal grandmother's tazachi, the whole of the property shall belong to the father and in the absence of the father the whole of the property shall belong to the maternal grandmother's tazachi.*

Rules of distribution where intestate has not left any of the heirs mentioned in sections 19, 21, 22 and 23

24 *Where the intestate has not left surviving him any of the heirs mentioned in sections 19, 21, 22 and 23, the property shall devolve on the tazachi of his mother's maternal grandmother or on the tazachi of a more remote female ascendant in the female line the nearer excluding the more remote.*

Devolution of property left by marumakkattayi female intestate

25 *On the death intestate of a marumakkattayi female her property which is self-acquired or separate shall devolve in the order and according to the rules contained in sections 26, 27, 28 and 29.*

Rules of distribution where intestate has left children and lineal descendants

26 *Where the intestate has left surviving her, children or lineal descendants in the female line through deceased daughters or both, the whole of the property shall belong to them.*

The provisions of clauses (iii), (iv) and (v) of section 20 and of Explanations I and II to that section shall apply to the distribution of the property among the children and lineal descendants of the intestate.

Rules of distribution where intestate has not left any child or lineal descendant.

27 *Where the intestate has not left surviving her any child or lineal descendant in the female line through a deceased daughter the whole of the property shall devolve on her mother's tazachi.*

Rules of distribution where intestate has not left any of the heirs mentioned in sections 26 and 27, but has left husband and maternal grandmother's tazachi

28 *Where the intestate has not left surviving her any of the heirs mentioned in sections 26 and 27 but has left her husband and her maternal grandmother's tazachi, one-half of the property shall devolve on her husband and the other half on her maternal grandmother's tazachi. In the absence of the maternal grandmother's tazachi, the whole of the property shall belong to the husband and in the absence of the husband, the whole of the property shall belong to the maternal grandmother's tazachi.*

Rules of distribution where intestate has not left any of the heirs mentioned in section 26, 27 and 28

29 *Where the intestate has not left surviving her any of the heirs mentioned in sections 26, 27 and 28, the property shall devolve on the tazachi of her mother's maternal grandmother or on the tazachi of a more remote female ascendant in the female line the nearer excluding the more remote.*

Devolution of property left by non-marumakkattayi male intestate.

30 (1) *On the death intestate of a male not being a marumakkattayi*

(i) *who—*

(a) *has before the date on which this Act comes into force, contracted as marriage with a marumakkattayi female which is valid under section 4, or*

(b) *has contracted on or after such date a marriage with a marumakkattayi female which is valid under that section,*

(ii) *who has left surviving him by such marriage or marriages one or more of the following relations, namely—*

(a) *a widow or widows,*

(b) *children,*

(c) *lineal descendants in the female line through deceased daughters, such relation or relations shall be entitled, if the intestate has also left relations who are heirs according to the personal law by which he is governed, to one-half of his property, which is separate or self-acquired and if the intestate has left no such heirs, to the whole of such property*

Provided that the reasonable funeral expenses of the intestate shall first be deducted from such separate or self-acquired property.

(2) *The property devolving on the relations referred to in sub-clauses (a), (b) and (c) of clause (ii) of sub-section (1) shall be distributed among them in accordance with the rule contained in clauses (i), (iii), (iv) and (v) of sections 20 and Explanations I and II to that section*

Possession and management of property until division is effected

31 (1) *The senior major members among the children and other lineal descendants through deceased daughters of the intestate or in the absence of any such male member the widow, or if there is more than one widow, the senior among such widows, shall be entitled to possession and management of the property referred to in sections 19, 21, 22 and 26 until division is effected*

(2) *In the case of the property referred to in section 30, if the intestate has left relations who are heirs according to the personal law by which the intestate is governed, such heirs shall be entitled to possession and management of the property until division is effected*

(3) *The karnavan of the tarwads mentioned in sections 23, 24, 27, 28 and 29 shall be entitled to possession and management of the property referred to therein until division is effected.*

CHAPTER V

TARWAD AND ITS MANAGEMENT

Duty of karnavan to keep accounts.

32 *The karnavan shall keep true and correct accounts of the income and expenditure of the tarwad. The accounts of each year shall be available for inspection at the tarwad house by the major anandavans once in a year throughout the month of Kanni following such year and any such anandavans may take copies of or extracts from such accounts*

Note—This section, however, has not altered the customary law to the extent of permitting a suit for accounts being filed against the karnavan.

Alienation of immovable property by karnavan

33 (1) *Except for consideration and for tarwad necessity or benefit and with the written consent of the majority of the major members of the tarwad, no karnavan shall sell immovable property of the tarwad or mortgage with possession or lease such property for a period exceeding twelve years*

(2) *No mortgage with possession or lease with premium returnable wholly or in part, of any such property executed by a karnavan for a period not exceeding twelve years, shall be valid unless, such mortgage or lease is for consideration and for tarwad necessity or benefit*

(3) *Nothing contained in this section shall be deemed to restrict the power of the karnavan to grant, in the usual course of management, for a period not exceeding twelve years any lease without premium returnable wholly or in part, or the rental of an existing kanam*

Debt contracted by karnavan when binding on tarwad

34 *No debt contracted or mortgage without possession executed by a karnavan shall bind the tarwad unless the debt is contracted or the mortgage is executed, for tarwad necessity*

35 *Every member of a tarwad whether living in the tarwad house or not, shall be entitled to maintenance consistent with the income and the circumstances of the tarwad.*

Relinquishment of karnavanship.

36 *Any karnavan may by a registered document give up his right as karnavan*

Application of chapter to tawazhi.

37 The provisions of this Chapter shall apply to every tawazhi possessing separate properties as if it were a tarwad.

CHAPTER VI**PARTITION****Right to tawazhi to claim.**

38 (1) Any tawazhi represented by the majority, of its major members may claim to take its share if all the proprietors of the tarwad over which it has power of disposal and separate from the tarwad

Provided that no tawazhi shall claim to be divided from the tarwad during the lifetime of an ancestress common to such tawazhi and to any other tawazhi or tawazhis of the tarwad, except with the consent of such ancestress, if she is a member of the tarwad

(2) The share obtained by the tawazhi shall be taken by it with the incidents of tarwad property

Explanation—For the purposes of this Chapter, a male member of a tarwad or a female member thereof without any living child or descendant in the female line, shall be deemed to be a tawazhi if he or she has no living female ascendant who is a member of the tarwad.

Note—This section confers in unmistakable terms upon a member who constitutes a tawazhi a right to demand partition and have his share in the joint estate converted into a separate estate. Hence a creditor of his is entitled to attach that share¹⁰⁴ and if that member dies after instituting a suit for partition and during its pendency, his legal representatives in whom his divided interest vests can continue the suit¹⁰⁵

Partition on change of religion.

Notwithstanding anything contained in section 38, any member of a tarwad who has changed his or her religion may claim or be compelled by any other member of the tarwad, to take his or her share of all the tarwad properties over which it has power of disposal and separate from the tarwad

Ascertainment of shares at partitions of tarwads

40 (1) In the case referred to in section 38, tawazhi shall be entitled to such share of the tarwad properties as would fall to the tawazhi if a division "per capita" were made among all the members of the tarwad then living

(2) Not less than two-thirds of the major members of a tarwad referred to in sub-section (1), may if any time presents petition to the Col¹ or for the registration of the tarwad as partible

Application of chapter to tawazhis

41 The provisions of this chapter shall apply to every tawazhi possessing separate properties as if it were a tarwad

CHAPTER VII**IMPARTIBLE TARWADS****Certain tarwads to be impartible unless registered as partible**

42 (1) Every tarwad included in the schedule shall be an impartible tarwad and the provisions of Chapter VI shall not apply to such tarwad unless and until it is registered as a partible tarwad

(2) Not less than two-thirds of the major members of a tarwad referred to in sub-section (1), may if any time presents petition to the Col¹ or for the registration of the tarwad as partible

(3) Such petition shall be in such form and contain such particulars as may be prescribed

(4) If, after giving notice to all the major members of the tarwad and making such inquiry as he deems fit, the Collector satisfied that not less than two-thirds of the major members of the tarwad have signed the petition with their free consent and the registration of the tarwad as partible, he shall register the tarwad as partible.

(5) On such registration, the provisions of Chapter VI shall apply to such tarwad

(104) *Subramanyam v. Naraina* (1938) 1 M.L.J. 710 47 L.W. 538 1938 M.L.W.N. 478 1938 M. 553

(105) *Madhav v. Subramaniam*, 49 L.W. 413, Kumbh v. Mohakshi, 45 L.W. 1113 59 M.L.W. 699 (101)

Registration of tarwads as impartible

43 (1) Not less than two-thirds of the major member of a tarwad may, at any time, present a petition to the Collector for the registration of the tarwad as impastible.

(2) Such petition shall be in such form and contain such particulars as may be prescribed.

(3) If, after giving notice to all the major members of the tarwad and making such enquiry as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the tarwad have signed the petition with their free consent, and the registration of the tarwad is impracticable, he shall register the tarwad as 'impia table'.

17. (14) On such registration the provisions of Chapter VI shall not apply to such railroad unless and until the registration is cancelled under section 44.

[illegible]

Cancellation of such reclassification

14 (1) Not less than two-thirds of the major members of the landowners' association, as impartible under section 43 may, at any time present a petition to the Collector for the cancellation of such registration.

(2) ~~Each problem shall contain not more than~~ shall contain not more than 7 particulars as may be prescribed

3) If after giving notice to all the major members of the band and making such inquiries as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the band have signed the petition with their free consent and desire the cancellation of the registration, he shall cancel such registration.

Power of Collector to take evidence on oath etc

45 The Collector shall for the purposes of this Chapter have the same powers as are vested in a Magistrate of the first class under the Code of Criminal Procedure, 1908, when trying a suit in respect of the following matters, namely:

- (a) enforcing the attendance of any person and examining him on oath or affirmation;
- (b) compelling the production of documents, and
- (c) issuing commissions for the examination of witnesses and proceeding before the Collector under this Chapter shall be deemed to be a judicial proceeding.

Collector's order to be final

41. The order of the Collector registering a ~~land~~ ^{tenure} as ~~possible~~ ^{impossible} under section 42 or registering a ~~land~~ ^{tenure} as ~~impossible~~ ^{possible} under section 43 or cancelling such registration under section 44, shall be final and shall not be ^{subject to appeal} ~~questioned~~ in any court.

Maintenance of register by Collector

47 The Collector shall keep a register of all petitions presented to him under sections 42, 43 and 44 and by bill orders passed by him on such petitions and shall at all reasonable times allow search to be made in such register, and shall, on payment of the prescribed fee, give a copy, certified under his hand, of any entry therein.

(106) *Madhavi v Nagappan*, 1938 M W N 133, 143 L W 268, affirmed in *L. R.* (1940) M. 1008 52 L. 721 (1940) 2 M L I 791, 1940 M W N 143, 1941 M J 82.

(107) *Krishnan v Narayanan*, 1938 MWN 330 47 LW 786 (1938) 1 MLJ 715 1938 M 555
(108) *Kuhilakshmi v Krishna*, 50 LW 164 (1999) MWN 809 (1999) 2 MLJ 287 (1999) M 299

CHAPTER VIII

MISCELLANEOUS

Construction of bequests, gifts, etc., to wife or wife and children.

48 *Where a person bequeaths or makes a gift of any property to, or purchases any property in the name of, his wife alone or his wife and one or more of his children by such wife together, such property shall, unless a contrary intention appears from the will or deed of gift or purchase or from the conduct of the parties, be taken as tavazhi property by the wife, her sons and daughters by such person and the lineal descendants of such daughters in the female line*

Provided that in the event of partition of the property taking place under Chapter VI the property shall be divided on the "stirpital" principle, the wife being entitled to a share equal to that of a son or daughter

Note—Where the property was purchased by the husband in the name of his wife and daughter, and the wife died before this Act was passed, the union of the wife with the husband cannot be said to have subsisted on the day when the Act came into force, and, therefore, her union with her husband cannot be treated as a legalised marriage so as to attract the stirpital division mentioned in this section 169

Rules.

- 49 (1) *The Local Government may make rules consistent with this Act to carry into effect the purpose thereof*
- (2) *In particular and without prejudice to the generality of the foregoing power, such rules may provide for—*
 - (a) *all matters expressly required or allowed by this Act to be prescribed, and*
 - (b) *the procedure to be followed in respect of applications under Chapter VII.*
- (3) *All rules made under this section shall be published in the 'Fort St. George Gazette' and on such publication shall have effect as if enacted in this Act.*

Savings.

- 50 *Nothing contained in this Act shall—*
 - (a) *be deemed to confer any rights on the parties to or the issue of any marriage which is dissolved before this Act comes into force, or*
 - (b) *be deemed to effect any rule of Marumakkattayam law, custom or usage, except to the extent expressly laid down in this Act*

THE SCHEDULE

[See the second proviso to section 14 and sub-section (1) of section 32.]

LIST OF IMPARTIBLE TARWADS

- 1 *The Zamorin's family consisting of—*
 - (a) *Puthia Kovalakom situate in Thiruvananthapuram taluk,*
 - (b) *Painhare Kovalakom situate in Mankar, Calicut taluk, and*
 - (c) *Kizhakke Kovalakom situate at Kottakal, Ernad taluk*
- 2 *The Charakkal Kovalakom near Cannanore*
- 3 *The Nilambur Kovalakom in Nilambur amsam, Ernad taluk*
- 4 *The Kizhakke Kovalakom of the Kottayam Raja's family, Kottayam taluk*
- 5 *The Thekke Kovalakom of the Kottayam Raja's family, Kottayam taluk*

(109) *Krishnan v. Thala*, 53 L.W. 452. (1941) 1 M.L.J. 508 1941 M. 605 See also *Thatha Amma v. Thankappa* 59 L.W. 563 (1946) 2 M.L.J. 175

- 6 *The Petuhare Kovilakom of Kottayam Raja's family in Kottayam taluk.*
- 7 *Ayancheri Kovilakom in Pwameri amsam, Kurumbanad taluk.*
- 8 *The Edavelath Kovilakom in Pwameri amsam, Kurumbanad taluk.*
- 9 *The Ayanazha Kovilakom of the Walluvanad Raja's family in the Walluvanad taluk.*
- 10 *The Kadannamena Kovilakom of the Walluvanad Raja's family in the Walluvanad taluk.*
- 11 *The Aripura Kovilakom to the Walluvanad Raja's family in the Walluvanad taluk.*
- 12 *The tarward from which the Kuthirava tam Nær attains stanom situale in Pulapatta amsam, Walluvanad taluk*
- 13 *The Tarward from which the Punnathur Raja attains stanom in Kottopadu amsam, Ponnani taluk*
- 14 *The Venganad Kovilakom of the Venganad or of Kollengode Valia Nambidi*
- 15 *The Mayapadu Raja's family of Kasargode taluk*
- 16 *The Neelasswar Raja's family of Kasargod taluk*

and ceremonies for the dead, and if it be wished to please relations, it is best to do so while they are yet living what a man drinketh, giveth and eateth in this world is of advantage to him but he earneth nothing with him at his end¹

The Jains appear to have originated in the sixth century before the Christian Era, to have become conspicuous in the eighth or the eighth or ninth century A.D. at the highest prosperity in the eleventh, and declined after the twelfth. Their principal seats seem to have been in the southern parts of the Peninsula and in Guzerat and west of Hindustan, Mewar and Malwar being apparently the cradle of the sect. They are very numerous in Guzerat, Kypitana and Canara and are generally an opulent and mercantile class, many of them being bankers and possessing a large proportion of the commercial wealth of India.²

656 Are the Jains governed by the Hindu Law?—It is usual to talk of Jains as dissenters from Hinduism and to apply to them the ordinary Hindu Law in the absence of proof of a custom to the contrary. The correctness of this judicial attitude is certainly questionable in the light of modern research which has shown that the Jains are not Hindu dissenters but that Jainism had a history long anterior to the Smritis and Commentaries which are the recognised authorities on Hindu Law and usage. In fact Mahu Vera, the last of the Jain Tirtankaras, was a contemporary of Buddha and died about 527 B.C. The Jain religion refers to a number of previous Tirtankaras and there can be little doubt that Jainism as a distinct religion was flourishing several centuries before Christ. So far as Jain law is concerned, it has its own law books of which Bhadrabahu Samhita is an important one. Vardhamani Nati and Acharya Nati by the great Jain teacher Hemachandra deal also with Jain law. No doubt by long association with the Hindus who form the bulk of the population, Jainism has assimilated several of the customs and ceremonial practices of the Hindus, but this is no ground for applying the Hindu Law as developed by Vijnaneswara and other commentators, several centuries after Jainism was a distinct and separate religion with its own religious ceremonial and legal system, *en bloc* to Jains and throwing on them the onus of showing that they are bound by the law as laid down by Jain law-givers. The proper thing to do in considering questions of Jain law relating to adoption, succession and partition is to see what the law as expounded by the Jain law-givers is and to throw the onus on those who assert that in any particular matter the Jains have adopted Hindu Law and custom and have not followed the law as laid down by their own law-givers.³ But the matter is not *res integra*. Due largely, if not entirely, to the superstitious notion of sacrilege entertained by the priests of the Jain shrines, which were normally the repositories of their sacred and legal literature, in the matter of releasing their books for perusal of the public or, diffusing their knowledge in any other way, so as to be easily available to the litigants, the Courts of the country were deprived of valuable materials in forming correct conclusions regarding the jurisprudential aspect of the customs and usages of the Jains, and the apparent similarity of their conduct to that of the generality of the Hindus amongst whom they lived and moved and had their being, was quite justifiably understood by the Court as pointing to a negation of the existence of a distinct and different code of laws governing the lives and conduct of the community of Jains as a whole. This process of assimilating the legal personality of a Jain with that of a Hindu for purposes applying to the former the personal law of the latter was considerably accelerated by the general apathy and indifference of the Jain jurists in the matter of making their voice heard within the citadel of justice.

(1) See the discussion of the origin of the Jains and their religion in *Bhagwandas Tejmal v Rajmal*, 11 Bom. H.C.R. 241.

(2) *Gatapva v Eramma*, 50 M. 220, 51 M.L.J. 757, 26 L.W. 408, 1927 M. 228.

The consequence is that to-day one finds a long catena of judicial pronouncements laying down almost uniformly and in unambiguous terms that the Jains are but dissenters from Hinduism and that in the absence of proof of custom to the contrary, the general incidents of Hindu Law are as much applicable to them as to those who are indisputably governed by those incidents.³ The result, however is not altogether unsatisfactory. After all, the Jains are of the same stock and soil as the Hindus, animated by common ideals and influenced by common aspirations in matters outside the narrow groove of religion. Their social, ethical and cultural backgrounds are virtually the same, hallowed by the same simple sublimity and enlivened and illumined by kindred philosophies. Even the manners and customs of the two peoples do not in many essential matters betray any profound difference in outlook or definite dissimilarity in details. As a matter of fact, it is plainly noticeable that in several of their ceremonial observances connected with happy occasions in the family like marriage, birth, etc., many of the practices of the Hindus in all their essentials are adopted and followed with the same scrupulous care and religiosity as are observable amongst the more orthodox sections of the Hindu community. In the case of kindred communities sprung from the stock and living cheek by jowl for centuries on the same soil, sharing in the woes and joys of a common country, and equally interested in its happiness and prosperity, all these are but natural and inevitable, and the fact that there has not been so far any violent or widespread agitation amongst the Jains against the application to them of practically the entire rules of Hindu Law is certainly a cogent argument in favour of the view that the Jains as a class are not dissatisfied with the application of Hindu Law to them and that the demurrers and objections which we hear in the Courts against such application emanate more from formal necessities than from any deep-rooted and general sense of dissatisfaction prevailing in the community at large. In a country housing the powder magazine of communal feuds and religious discords, aggravated by caste and social barriers and accentuated by acute differences in the personal laws of inhabitants, the administration of a uniform and homogeneous law for the entire population is the first device to be thought of and will undoubtedly go a long way for avoiding the oft-recurring and unfortunate communal conflicts and dissensions, and the British Indian Courts have really done, though unwittingly a valuable service to the country by judiciously instilling in the minds of the Jains the idea that they are one with the Hindus.

It is significant that the provisions of the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956 the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956 are made applicable *in toto* to Jains also.

657 The Jains are governed by the Mitakshara School—The Jains differ from the Brahminical Hindus in their conduct towards the dead, repudiating their doctrines relating to obsequial ceremony, the performance of the Shraddh, and the offering of oblations for the salvation of the soul of the deceased, nor do the Jains believe that a son by birth or adoption confers any spiritual benefit on the father.⁴ According to the Jain religion, every man is the

3) *Chota Lal v Chun u Lal*, 6 I A 15 4 C 714 (P.C.), *Sheo Singh v Mt Dakho*, 1 A 688, *Rup Chand v Jambhi*, 3 A 247 *Bhawan v Basi*, 31 C 11 (P.C.) *Dharraj v Soni Bai*, 52 I A 231 23 A L J 273 27 Bom L R 837 30 C W N 601 49 M L J 173 1925 P C 118, *Geetpva v Brama*, 50 M 228 51 M L J 757 26 L W 408 1927 M. 228, *Bhikkabai v Mani Lal*, 32 Bom L R 1217 1930 B 517 54 B 780, *Mt Lado v Bapari*, 14 Lah 95 1932 Lah 546, *Sheokumarbai v Joraj*, 25 C W N 273 1920 M W N 627 1921 P C 77, *Jaswant v Anandi*, 1 L R (1938) A 196 1937 A L J 1295 1938 A 62 (Unmarried daughter excludes married daughter in succession to mother's stridhana)

(4) *Sheo Singh v Mt Dakho*, supra, *Dharraj v Soni Bai*, supra

architect of his own beatitude, and his progress or felicity in the world in which he is supposed to be sojourning after his death is not dependent on or facilitated by the oblations that may be made to him by his sons or relations whom he has left here below. In view of this fundamental creed of the Jains, it is but natural that the school of Hindu Law that should apply to them is what may be called the secular school of the *Mitakshara*⁶ and not the *Diyabhaga* School built and developed essentially on spiritual considerations. Hence even in Bengal the law which governs the Jains is the *Mitakshara* law⁷ and not the law which is applicable there to the generality of the Hindus. In other Provinces it is the *Mitakshara* that applies, its modified by the rules of the sub-school that is prevailing in any particular Province.⁸ Jains though generally a free widow cannot make an adoption without the authority of the husband, explicit or implied yet in Bombay a widow can adopt even without her husband's authority if there is no prohibition from him under the *Mitakshara* she can make the adoption in the absence of her husband's authority with the consent of his sagandias. The principle of the applicability to the Jains of the general rules of the Hindu Law prevailing in each Province is subject to the operation of any custom to the contrary which is proved applicable to them in that Province. For instance, even in a Province where a Hindu widow cannot adopt without her husband's authority a custom may be proved by which the widow is empowered to adopt without the husband's authority. It may be convenient to consider this question under separate heads in addition to the following:—

(1) *Adoption among Jains*.—The Jains follow the Hindu law in all matters relating to adoption, and in the absence of any custom to the contrary they are governed by the same rules as the Hindus. A widow is competent to adopt in the absence of the progenitor, although in some cases a widow is incompetent to adopt a particular person, as in the case of the adoption of a son of the deceased, where, the Jains like so generally do in the Hindu Law, that the Hindu law of adoption is applied to the Jains in the absence of any contrary usage.⁹ Thus, even in the *Baghelkhand* a widow is competent to adopt a son, although the absence of her husband's authority in the absence of any custom set up to the contrary, according with the *Mitakshara* law, but in *Benares* a widow had not proved to be competent to make an adoption in the absence of her husband's authority, although an adoption conceived in this way by the widow was not permitted by the *Mitakshara* law.¹⁰

(6) *Sundar Lal v. Bakht*, 11 Cal. 78; *Raj Chand v. Junna*, 47 I.A. 93; 7 A.I.J. 349; 1 C.W.N. 54; 12 Bom. L.R. 102; 6 I.C. 272; *Baghel v. Mahesh Lal*, 3 A. 59.

(6) *Mt. Mandi Kaur v. Phool Chand*, 2 C.W.N. 151.

(7) *Goleppa v. Brama*, 50 M. 228; 51 M.I. 757; 26 I.A. 403; 1927 M. 228; *Bhikaji v. Mani Lal* 54 B. 780; 30 C.W.N. 601; 49 M.L.J. 173; 1925 P.C. 118; *Hirachand v. Rawji*, 11 B. (1919) B. 512; 41 B. 13; 1920 M.W.N. 627 (Adoption).

(8) *Sheo Singh v. Mt. Lakho*, 1 A. 688; 5 I.A. 87; *Dhanraj v. Sons* D-1; 52 I.A. 31; 23 A.I.J. 273; 27 B. 13; 1920 M.W.N. 601; 49 M.L.J. 173; 1925 P.C. 118; *Shuganchand v. Prakashchand*, 1926 S.C. 506.

(9) *Shankar Das v. Jeoraj*, 25 C.W.N. 273; 1920 M.W.N. 627; 1921 P.C. 77; *Shuganchand v. Prakashchand*, *supra*.

(10) *Goleppa v. Brama*, *supra*; *Pendd Amman v. Krishnaswami*, 16 M. 162.

his heirs,¹¹ and that adoption can even be of a grown up and married man.¹² It has further been held that the only essential ceremony for the validity of an adoption is the giving and taking of the adoptee and that the ceremonies prescribed by the Hindu Law need not be gone through.¹³ It has even been said that an unequivocal declaration of adoption followed by the treatment of a person as an adopted son would be sufficient to constitute an adoption valid among the community of Jains with which the Court has to deal.¹⁴ But these rulings which are contrary to the general law of the Hindus proceed on the footing of custom proved in each case and cannot be held to affect the general law that in the absence of proof of any such custom the ordinary law applicable to the Hindus must be applied to the Jains also. On the ground of custom an adoption of an orphan¹⁵ or of a daughter's son or sister's son,¹⁶ has been held to be valid. When there is a valid adoption, though according to the custom of the Jain community which is contrary to the general Hindu law, the adopted son acquires all the rights of a natural born son and if the adoptive father was at the time of his death a member of a coparcenary, the adoptee takes his coparcenary interest¹⁷, and if a natural son is born after the adoption, the adopter gets in competition with that son his share computed according to the rules given in section 153.¹⁸

659 Inheritance amongst the Jains — It has been held in a long series of cases that the Jains are governed by the Hindu Law of the Mitakshara School except in so far as it may be proved to have been modified in any particular instance by a well established custom. Hence in the absence of such custom the ordinary Hindu Law of inheritance according to the Mitakshara is to be applied to the Jains,¹⁹ they being treated as belonging to one of the twice-born castes.²⁰ Thus a widow of a coparcener cannot claim to succeed to his interest in

(11) *Sundar Lal v Baldeo*, 14 L. J. 8 (Agarwal Jains of Delhi), *Sheo Singh v M. Dakha*, 1 A. 688, 5 I. A. 87 (Saroj Agarwals of North Western Province), *Lakshmi Chand v Gatto*, 8 A. 314 (Jains of Aligarh District), *Manohar Lal v Banarsi*, 29 A. 4-5 (Jains of Meerut), *Ashvini v Rup Choud*, 30 A. 1-7 (Jains of Saharanpur), *Sheo-karnabi v Jeoraj*, 61 I. C. 481, 25 C. W. N. 273, 1020 M. W. N. 621, 1921 P. C. 77, *Manik Chand v Jagat Dattani*, 17 C. 518 (Oswal Jains), *Harnath v. Mandil*, 27 C. 379 (holding that there is no difference in the custom on the point among Agarwal, Chorawal, Khandwal and Oswal sects of the Jains), *Rupchand v Narayan*, 20 P. R. 1897 (Jains of Karnal), *Narmchand v Sanjosh*, 14 Luck. 483, 1939 Oudh. 113, *Sugandh v Mangibai*, 1 I. R. (1942) B. 467, 44 Bom. L. R. 358, 1942 B. 185.

(12) *Manohar Lal v Banarsi*, supra, *Sheokarbi v Jeoraj*, supra, *Dhinaraj v Sonibai*, 52 I. A. 231, 23 A. L. J. 273, 27 Bom. L. R. 837, 30 C. W. N. 61, 49 M. L. J. 173, 1925 P. C. 118.

(13) *Lakshmand v Gatto*, supra, *Sheokarbi v Jeoraj*, supra, *Dhinaraj v Sonibai*, supra.

(14) *Chaman Lal v Hari Chand*, 40 I. A. 156, 40 C. 879, 15 Bom. L. R. 646, 17 C. W. N. 885, 1913 M. W. N. 502, 19 I. C. 669.

(15) *Parvatham v Venkchand*, 45 B. 754, 1921 B. 147.

(16) *Lakshmi Chand v Gatto*, supra (daughter's son), *Sheo Singh v Mt. Dakha*, supra (daughter's son), *Ali v Nigro Mal*, 1 A. 288, *Yemshetti v Ashok*, 42 Bom. L. R. 895, 1940 B. 391 (daughter's son).

(17) *Sundar Lal v Baldeo*, 14 L. J. 78, *Manohar v Banarsi*, supra.

(18) *Vakhab v Chunnalal*, 16 B. 347.

(19) *Sundar Lal v Baldeo*, supra, *Bhikhab v Mukhlal*, 3 A. 55, *Mt. Mandi Koer v Phool Chand*, 2 C. W. N. 134, *Bhikhab v Muni Lal*, 54 B. 780, 32 Bom. L. R. 1217, 1930 B. 517.

(20) *Ambabai v Govind*, 23 B. 257, *Sheokarbi v Jeoraj* supra.

the coparcenary property,²¹ nor can she claim to be absolutely entitled to the property inherited by her from her husband when he had died childless leaving ancestral property.²² But owing to the proof of custom in some cases it has been held therein that in the case of self-acquired property left by a Jain and taken by his widow as his heir, she takes an absolute estate.²³ The fact that the ancestral property of a Jain was held by him as the last surviving coparcener would not make it the self-acquired property so as to make the widow or mother taking that property on his death as his heir the absolute owner thereof.²⁴ No doubt the Jain books like *Arhan Niti*, *Badra Bahu Samhita* and *Vartaman Niti* do contain some passages pointing to the absolute ownership of the widow in the property inherited by her from her husband, but obviously they cannot be acted upon as binding on the Courts in view of the fact that the rules enunciated therein are often inconsistent with one another and do not seem to be reflecting the beliefs and customs of the Jains in the present day, the most glaring conflict between their precept and the present day custom being in the matter of preference given in those books to the widow over the son for succession to a deceased Jain, a precept not at all observed by the Jains at the present day.²⁵ In view of the apparent inconsistencies in the Jain books and the wide gulf that often exists between their precepts and the customs practised by the Jains which in many instances conform to those practised by the Hindus, the Courts have chosen to administer, not without justification, the Hindu Law wherever any custom pleaded and proved does not point to any contrary conclusion. Thus it was held that a son is entitled to succeed to the stridhana property of his mother²⁶ and that as between a married daughter and an unmarried daughter the latter succeeds in preference to her sister to such property.²⁷ It was also held that where the stridhana property of a Jain widow was taken by her three daughters, they held it only as joint tenants without any right in any of them to alienate it except for legal necessity and with the consent of the rest.²⁸

660 Widow's estate—Inasmuch as the general Hindu Law must be held to apply to the Jains in the absence of proof of evidence to the contrary, the wellknown rule of the Mitakshara law that a woman succeeding to the property of her husband or son takes only a limited estate in that property must be held to apply to the Jains also. But judicial decisions have held, based upon the custom alleged and proved in each individual case, that in respect of the self-acquired property of the husband which the widow has inherited as his heir, she takes it as an absolute owner. The result of the decisions bearing on the point may be summed up as follows:

The custom of a widow having an absolute title with regard to the ancestral immovable property held by the husband is not held proved in any of the decisions.²⁹ In some of the Allahabad cases the widow's right to alienate the self-acquired property inherited from the husband was held proved,³⁰ but a distinction is made between immovable property inherited

(21) *Mt. Lado v. Bannars*, 14 Lah. 95.

(22) *Bhikaji v. Mam Lal*, 34 B. 780, 32 Bom. L.R. 1217; 1930 B. 517, *Nikram Singh v. Srivastav*, 1926 A. 586, 24 A.L.J. 751, *Pankaj v. Shamsher*, 29 A.L.J. 314; *Bachevi v. Makhan Lal*, 3 A. 55.

(23) *Shro Singh v. Mt. Dakho*, 1 A. 688, 5 I.A. 87, *Harnath v. Mandi*, 27 C. 379, but see *Mt. Mandi v. Phool Chand*, 2 C.W.N. 154 and the discussion of this question in *Bikhabai v. Mons Lal*, supra, *Chavli v. Meghoo*, 1946 A. 61, 1945 A.L.J. 318.

(24) See *Bhikabai's case*, supra.

(25) *Hariram v. Madan Gopal*, 33 C.W.N. 493, 1929 P.C. 77.

(26) *Jaswanji v. Anand*, 11 L.R. (1938) A. 196, 1938 A. 62.

(27) *Chavli v. Meghoo*, 1946 A. 61, 1945 A.L.J. 318.

from the husband and the ancestral property in his hands. There is a conflict of decisions in the Calcutta High Court, and in *Harnabhi v. Mandil*⁽²⁸⁾ there is an *obiter dictum* that there is no distinction between the self-acquired property of the husband and the ancestral property held by him. The Bombay High Court has held that a custom that a Jain widow is the absolute owner of the immovable properties inherited from the husband has not been proved, much less the power of the widow to alienate ancestral property which has become the separate property of the husband and inherited by the widow as his heir and that the right of the mother to alienate even the self-acquired property of her son inherited by her has neither been alleged nor held proved in any of the decisions so far rendered.

(28) 27 C. 379 at 393.

CHAPTER XIX

HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937 *

Scope and operation of the Act	Widow's share liable to fluctuation by survivorship
Effect of the Act on the law of devolution under the Dayabhaga	Widow's right to challenge alienation of family property.
EFFECT OF THE ACT ON DEVOLUTION OF SEPARATE PROPERTY UNDER THE MITAKSHARA	Widow's right to partition
Introduction of new heirs.	Widow's maintenance
Widows	Widowed daughter-in-law
Separate property	Immortality and re marriage of daughter-in law
Unchastity and re marriage of the widow	THE EFFECT OF THE ACT AS REGARDS THE COPARCENARY INTEREST OF DECEASED HINDU
Status of the statutory co-heirs	Position of the coparcener's widow
Widow's share how to be calculated	Widow's liability for her husband's debts
Nature of the interest taken by the widow	Alienation by widow.
Nature of the widow's right to claim partition	Apostacy of the widow
Widow's share when determined	
Widow and illegitimate son of a Sudra	

1 **Short title and extent** —(1) This Act may be called The Hindu Women's Rights to Property Act, 1937

(2) It extends to the whole of British India, including British Baluchistan and Sonthal Parganas but excluding Burma

2 **Application** —Notwithstanding any rule of Hindu Law or custom to the contrary the provisions of S 3 shall apply where a Hindu dies intestate

3 **Devolution of property** —When a Hindu governed by the Dayabhaga school of Hindu Law dies intestate leaving any property and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property *his widow* or if there is more than one widow, all his widows together shall subject to the provisions of sub-S (3), be entitled in respect of which he dies intestate to the same share as a son

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu Law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-S (3), have in the property the same interest as he himself had

* This Act has been repealed by the Hindu Succession Act, 1956, Section 31

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition to a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925, applies.

4 **Saving**—Nothing in this Act, shall apply to the property of any Hindu dying intestate before the commencement of this Act

5 For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

HINDU WOMEN'S RIGHTS TO PROPERTY ACT

Scope and operation of the Act—The Act has no retrospective operation¹ It has no application to properties situate in foreign countries,² or to properties which did not belong to the deceased in his own right but were vested in him as a trustee³ The Act does not apply to the property of a Hindu female⁴ The Act applies only when a Hindu dies intestate either partially or wholly and does not apply where he has disposed of all his property

Under the Act a Hindu widow's right was severely circumscribed by its provisions. She had no doubt a demonstrable right to obtain the entitlement to which her husband was entitled to either in his self-acquired property or in the coparcenary in which he was a member. She could demand a partition of her share from the other sherrers or coparceners. But the overall limitation or circumscription which was conceived by the Act was that she should not for reasons not contemplated and accepted by the then personal law of the Hindus, sell or alienate her share except for accreted and sanctioned purposes⁵

The provisions of the Act so far as succession to the separate property of a Hindu is concerned may be summarised as follows—

(i) His sons, his widows, the widows of his predeceased sons, his sons, sons and sons' sons and the widows of predeceased sons of predeceased sons, succeed together to that property with this qualification that if the parties are governed by the Dayabhaga School in the presence of the son his own son cannot claim any interest in the property inherited

(ii) The share of the widow of a propositus is equal to that of a son where there is a son or son's widow or grandson or grandson's widow or great-grandson. If the propositus has left more than one widow of his, then all such widows together will take the share of a son. If the propositus has left only his widow or widows and none of the other heirs mentioned in the Act, then she or they take the whole estate.

(1) *Manohar Lal v. Bhuri Bai*, 1972 S.C. 1369

(2) *Umajal v. Lakshmi*, (1944) 1 M.L.J. 70 I.L.R. (1944) Mad 556 57 L.W. 27 1944 M.W.N. 137

(3) *Hazari Lal v. Mahesh*, 1961 M.P.L.J. 519

(4) *Sham Lal v. Amar Nath*, (1970) 1 S.C.J. 503; 1970 S.C. 1643.

(5) *Narasimhaiah v. Andamalai*, (1978) 2 M.L.J. 524.

(iii) The share of the widow of a predeceased son is equal to that of a son provided that in the case of the existence of more than one widow of a predeceased son, all such widows are entitled to claim only one such share and provided further that if there is a son of such predeceased son all such widows will take together a share which is equal to that of a grandson.

(iv) Similar provisions apply in the case of the widow or widows of a predeceased son of a predeceased son.

(v) Each of the widows above-mentioned is entitled to claim and sue for partition and delivery to her of her share under the Act.

In the case of a widow of a member of a Mitakshara coparcenary she virtually steps into the shoes of her husband and is entitled to claim a separation and delivery to her of his share both as against his sons and as against his other coparceners, whether they be ascendants, descendants or collaterals of her husband.

The term "widow" necessarily denotes the relationship with a deceased husband who before his death was her husband. She may be a widow of her deceased husband for purposes of Section 3 of the Act and she may continue as the wife of her other husband who had married her along with her deceased husband in a community where polyandry was permitted.⁶

Effect of the Act on the law of Devolution under the Dayabhaga.—Dayabhaga succession which made no difference between the ancestral and self-acquired property is not departed from under the present Act. The only change is that on the death of a Hindu, not only his sons succeed but also his widow and the widows of predeceased sons and the widows of predeceased sons of predeceased sons can succeed. Even after the Act, if the son has succeeded to his father's estate either alone or along with the other heirs mentioned in the Act, his own son (that is, the son's son) does not get an interest in it during his lifetime. No doubt if the son who has succeeded to his father's estate dies, then that son's son can claim to succeed to the property along with the latter's mother or step-mother, each taking a half share. But during the lifetime of the father neither the son nor the son's widow has any interest in the property.

A widow or the widowed daughter-in-law can succeed to the property of a Hindu under the Act freed from the restriction imposed by the Dayabhaga School that she should be chaste at the time the succession opens. On remarriage she forfeits the interest that she has taken, her share then going to the persons who would be the heirs of the person as whose heir she had originally taken the property. The same rule applies if she dies. Thus if on the death of a Dayabhaga Hindu, his widow, his son, the son of a predeceased son and the widow of another predeceased son had succeeded to his property, the subsequent death of the widowed daughter-in-law would enable the rest of the heirs of her father-in-law to take that interest by succession as the property of the father-in-law and not by survivorship as coparceners under the Mitakshara. If in this illustration the son subsequently dies, his share would be taken only by his mother as his own heir and not by his co-heirs.

In one case,⁷ however, before the Calcutta High Court, it was held that where a Hindu died leaving two sons, a widowed daughter-in-law, and her husband's daughter and the

(6) *Krishna v. Ammalu*, 1971 Ker. L.T. 599, 1972 Ker. 91.

(7) *Prakash Ch. Roy v. Prakash*, 50 C.W.N. 559, See also *Kamalebala Bose v. Jiban Krishna*, 50 C.W.N. 555.

daughter-in-law died subsequently, the share taken by her would go to her father-in-law's heir to the exclusion of her husband's daughter, and if instead of a daughter the daughter-in-law's husband should have left a son, the daughter-in-law's share would devolve on all the heirs of the father-in-law and not merely on that son. The latter part of the decision does not commend acceptance.

EFFECT OF THE ACT ON DEVOLUTION OF SEPARATE PROPERTY UNDER THE MITAKSHARA

Introduction of new heirs — Under the law prior this enactment, the widow of a Hindu was no heir to his property in the presence of his sons. This Act not only makes her an heir along with the sons, but also introduces the widowed daughter-in-law, and the widowed grand-daughter-in-law as new heirs. These widows succeed with the sons and before the daughter, the daughter's son and the parents.⁸ The widowed daughter-in-law's right to come in as the heir of the father-in-law under the Act was held by the Federal Court to be claimable only in respect of his separate property in the sense of self-acquired property, and not in respect of property held by him as sole surviving coparcener.⁹

Widows — A widow is entitled under the Act to the same share as a son either in competition with a son or in competition with a widowed daughter-in-law or in competition with any other lineal male descendant or his widow entitled to succeed under this Act. If the prepositus has left more than one widow all the widows together will be entitled to the same share as that which would come to a sole widow. But when the widow is the only relation left and there is neither a son nor any of the other relations mentioned in the Act, she is entitled to her husband's whole estate, though she has equal feet-overs.¹⁰

Separate property According to the decision of Federal Court in *Ungal Ach v. Lakshmi Ach*¹¹ the expression "separate property" meant only the self-acquired property of the deceased Hindu. Property held by a person as a sole surviving coparcener of a joint Hindu family was not his separate property within the meaning of section 3 (1) of the Act so long as there was a woman in the family who can bring in a new coparcener by adoption.¹² As pointed out by the Privy Council in *Anant v. Shankar*¹³ a coparcener must be held to subsist so long as there was in existence a widow of a coparcener capable of bringing a son into existence by adoption. In that very case, the Judicial Committee refer to the property held by a surviving coparcener as joint family property in his hands. Likewise it should be held that the property when a coparcener obtains at a partition is joint family property though the coparcener may, after the partition, have absolute powers of alienation so long of course, there is no son born to him, after the partition, who would on birth be entitled to a share in such property. The Orissa High Court has construed section 3 (2) of the Act in the same manner as indicated

(8) *Bhagwan v. Jai Devi*, I.L.R. (1944, A 40) 1944 A 224

(9) *Umayal v. Lakshmi*, (1945) 1 M.L.J. 108 (F.C.), See contra in *Nand Kumar v. Balkan*, 1945 Pat 87 23 Pat 508. Even the interpretation by the Federal Court is not without anomalies.

(10) (1945) 1 M.L.J. 108

(11) *Manohar Lal v. Bhuri Bai*, 1972 S.C. 369

(12) 70 I.A. 232 I.L.R. (1944) R. 116, 56 L.W. 749 49 C.W.N. 94 46 Bom. L.R. 1; (1949) 2 M.L.J. 599, 1949 P.C. 196

above in the case of *Visalamma v Jagannadha Rao*¹³ In that case the learned Judges held that where a Hindu has effected a partition with his only son and the parties are governed by the Madras school of Hindu Law the properties which fell to the share of the father are not his separate properties for the purpose of section 3 (1) but are joint family properties within the meaning of section 3 (2) of the Act

In *Lakshmanma v Kondappa*,¹⁴ it was held that ancestral property which had been allotted to one of the sons and subsequently dealt with by him under a settlement between him and his daughter and widowed daughter-in law could not be considered as his separate property.

Where a Hindu died in 1926 his predeceased son's widow would not succeed under the Act even though the widow of the deceased died after the Act [*Phula v Narpat*,¹⁵ *Tashodabhai v Shanta*¹⁶ *Moni Devi v Hadibandu*¹⁷, *Haramani v Dinabandhu*,¹⁸ *Nanda Kishore v. Sukthi*,¹⁹ *Umayal Achi v Lakshmi Achi*²⁰

Shebaitship like any other heritable property follows the line of inheritance from the founder and hence attracts the applicability of the provisions of this Act *Augur Bala Mullick v Debabrata*²¹ The right of trusteeship or the right of management of trust property whether the trustee has or has not a beneficial interest in the dedicated properties can pass to a woman by succession except where the functions to be discharged involve spiritual duties which a woman cannot properly discharge.²²

The widow does not obtain her right under the Act either by survivorship or by inheritance and hence she is not bound to obtain a succession certificate in respect of moneys due to her husband (*Natarajan v Perumal*)²³ See contra in *Jadavbas v Purnemmo*²⁴ She is not a coparcener with the surviving coparceners, *Parappa v Nagamma*²⁵ The widow taking an interest in the joint family of her husband under the Act is his legal representative and is entitled to continue a partition suit filed by her husband (*Shankar v Gangaram*,²⁶ *Ingal Kishore v. Wardhasa*,²⁷ *Dattuk v Sandagar*²⁸ A widow succeeding to the interest of her husband under the Act

(13) 1935 Orissa 160

(14) 1961 A P 507

(15) 1954 All. 307

(16) 1953 M L J. (S N) 262

(17) 1955 Orissa 73

(18) 1954 Orissa 54

(19) 1953 Orissa 240

(20) 1945 F C. 25.

(21) 1951 S.C 293 (1951) S C R 1125 64 L W 960

(22) *Karthian Kone v Bagayathammal*, 1969 82 Mad. L W 425.

(23) 1943 Mad 246.

(24) 1944 Nag 243

(25) 1954 M 576.

(26) 1952 B. 127.

(27) 1955 Nag. 166.

(28) 1953 Pat. 240.

does not become the manager of the family in the right of her husband. Nor does the fact that she happens to be the eldest member of the family invest her with such a right. If there is an adult male member, he is the manager in spite of the fact that he is junior in age to the widow.) *Rakhmabai v. Sitabai*,³⁰ *Mahadu v. Gajabai*,³¹ *Radha Ammal v. Commissioner of Income-tax*.³²

Where pending a partition suit between father and sons the father died, his widow was held entitled to a share under the Act and not as mother to an additional share, *Shyama v. Vishwanath*.³³ The right which a widow gets under the Act cannot be defeated by her husband making a will of his interest to his sole surviving coparcener. [*Palani Ammal v. Karasipakkal*.³⁴] In *Rathivasipathy v. Saravathi*,³⁵ it was held that the Act did not abolish the widow's right to maintenance and it was still available after the Act, there being an option in her to claim maintenance or a share but not both. (See also *Parappa v. Nagamma*.³⁶ But see *Shyama v. Vishwanath*.³³)

The ornaments which are the separate property of the widow cannot be taken into account in determining her share in the property left by the husband whether the property is joint family property or the separate property of the husband [*Baburao v. Sautribai*.³⁷ *Hanuman v. Tulabai*.³⁸] The interest taken by a widow under the Act is alienable by her like any other property (*Kunja Sahu v. Bhagaban*.³⁹ *Harekrishna v. Jyotshti*.⁴⁰ *Pem Mahlon v. Bandhu*.⁴¹ and when she alienates it without necessity the alienee gets the right to enjoy the property during the widow's lifetime and can claim partition and possession of the widow's share (*Dagadu v. Namdeo*).⁴²

In *Ramaya Konar v. Mottiah Mudahar*,⁴³ a Full Bench of the Madras High Court held that a Hindu married woman who is unchaste at the time of her husband's death is disqualified from inheriting his interest in the joint family property under Section 3 of this Act. It cannot be said that the Act has either expressly or by necessary intendment done away with the personal disqualification like unchastity imposed by Hindu Law on widows claiming to succeed to the estate of their deceased husbands. The rule of Hindu Law to the contrary referred to in Section 2 must be construed as confined to the rule of Hindu Law excluding a widow from succession to her husband's estate if he had left a son or grandson or great-grandson or if he had died a member of a joint Hindu family leaving him surviving his coparceners. It is the

(29) 1952 B. 160.

(30) 1954 B. 442.

(31) 1945 M. 306.

(32) 1955 B. 410.

(33) (1955) 1 M.L.J. (N.R.C.) 52.

(34) 1954 Mad. 307.

(35) 1954 M. 376.

(36) 1952 Nag. 270.

(37) (1955) M.L.J. (S.N.) 169.

(38) 1951 Orissa 35.

(39) 1956 Orissa 73.

(40) 1958 Pat. 20.

(41) (1955) B. 151, I.L.R. (1954) B. 1069.

(42) 1 L.R. 1952 Mad. 187 1951 Mad. 954 (1951) 2 M.L.J. 314.

rule of Hindu Law that must be held to have been superseded by Sect. 3 of this Act and to that extent and no further can Section 3 be held to be contrary to and in supersession of the rule of Hindu Law. This view has been followed by other decisions of other High Courts as well. [See *Kanailal v. Pannasashi*⁴³ See contra in *Akoba v. Laxman*⁴⁴] It is a fortiori that a widow re-marrying should forfeit her right of succession to the property of her deceased husband. *Manabai v. Chandan Bai*⁴⁵ In *Surja Kumar v. Manmatha*⁴⁶, it was held that "in chastity of the wife had been condoned by the husband the unchastity would not be a bar

Unchastity and re-marriage of the widow—The opening words of Section 2 namely, "notwithstanding any rule of Hindu Law or custom to the contrary," would, on their strict construction, suggest that the normal rule of Hindu Law which disables an unchaste widow from succeeding to her husband's property can no longer be operative, though it is doubtful if the legislature had really intended to abrogate that rule. Though this may be the position in respect of the immoral wife's right to succeed to her husband's property, yet if she re-marries, her re-marriage will entail the forfeiture of her right to hold on to the husband's estate and the estate or share which she has taken therein will in law pass on to persons who at the time of the re-marriage are entitled to the husband's property.

Status of the statutory co-heirs—In places governed by the Mitakshara school, in the interest taken by a son in the separate property of a deceased father that son's son and grandson get a right by birth; and in cases governed by the Dayabhaga, where a father's property is inherited by a son, the latter's son does not get an interest by birth in that property. So also the existence of the managership in the eldest male member should still be postulated with all the privileges and powers of management and alienation appertaining to that position and the corollary and concomitant disabilities and obligations of the junior members.⁴⁷ But if there is no adult member, there is nothing to preclude a female member of the family who is competent and willing from taking up the reins of the government of the household with all the incidental and necessary rights and duties flowing from the position of managership. She can contract debts and alienate the family property for the benefit of necessity of the family of which she is the manager and the junior members of the family, both males and females, would be bound by such debts and alienations. She can sue⁴⁸ and be sued as representing the entire family and can generally do all acts which can be said to be acts of prudent management. But she cannot claim to be a coparcener with her sons.⁴⁹

Widow's share how to be calculated.—The share of the widow which is to be equal to the share of the son under the Act is to be calculated with reference only to the separate pro-

(43) 1954 Cal 598.

(44) 1941 Bom. 204.

(45) 1954 Nag 284

(46) 1953 Cal. 200.

(47) *Kelian Rai v. Kashi*, I.L.R. (1943) A. 307; 1943 A. 108; *Satyamangana v. Narayana*, (1943) 2 M.L.J. 282; 56 L.W. 487; (1943) M.W.N. 478; 1943 M. 708.

(48) *Nasorejan v. Prasad*, 55 L.W. 823; (1942) 2 M.L.J. 668; 1942 M.W.N. 703; 1943 M. 246 (No succession certificate necessary to entitle her to sue on a promissory note in favour of the husband). But see *Jagat v. Purno*, I.L.R. (19-4, Nag. 832; 1944 Nag. 245, where it was held that a succession certificate would be necessary.

(49) *Susha Bai v. Narasimha*, 58 L.W. 24; *Nasorejan v. Prasad*, supra.

property left undisposed of by the husband. If he has already gifted or devised some or most of his properties to his sons and has left only a portion thereof undisposed of then the widow's share is to be ascertained on the footing that the undisposed of properties are the only properties left by the husband and that in those properties the widow and the sons must share equally. So also the share which is to go to her thus calculated is not to be affected or reduced by the circumstances that she had already been given large properties or moneys or jewels by her husband or father-in-law. Nor is this share to which the widow is entitled under the Act in respect of the undisposed of separate property of the husband, affected by any partition in respect of the ancestral property of the husband effected during or after his lifetime and in which she has been given, as she is entitled to, a share under the general law along with her sons. The distinction between the share to which the widow is entitled under this Act in the undisposed of separate property of her husband and the share to which she is entitled under the general law on a partition between the sons is this, that while the former share comes to her as determination and division of her statutory right in the property, in the latter case the share is allotted to her in lieu of maintenance with the result that in the calculation of her share in the latter, case any income-yielding property given to her already by her husband or father-in-law would be taken into account and her share correspondingly reduced.

Nature of the interest taken by the widow.—In *Satughan v. Sabhyani*,⁵⁰ it was observed that the interest of the widow arose not by inheritance nor by survivorship but by statutory substitution. The widow by reason of her introduction into the coparcenary could not be held to have become a coparcener. But being clothed with all the rights and concomitants of a coparcener's interest it would be futile to contend that the widow could not be treated either as a member of the coparcenary or as having been conferred coparcenary interest in the property.⁵¹ In *Controller of Estate Duty v. Alladi Kuppuswamy*,⁵² the question was whether the interest of the widow of a coparcener took on the death of her husband in the family property was a coparcenary interest and whether on her death that interest would be liable for estate duty. In answering the question in the affirmative the Supreme Court held that by virtue of the provisions of the Hindu Women's Rights to Property Act, 1937, the widow undoubtedly possessed a coparcenary interest as contemplated by Section 7 (1) of the Estate Duty Act, she was also a member of a Hindu coparcenary as envisaged by Section 7 (2) of that Act and on her death her interest merged in the coparcenary property becoming exigible to estate duty.

Nature of the widow's right to claim partition.—The interest which the widow takes is an alienable right and the alienee can ask for partition and possession of her share. *Harekrishna v. Jujeshu*,⁵³ *Pem Mahlon v. Bandu*.⁵⁴ Again a suit for partition effects a severance in interest of a coparcener and if anything the widow's position must be a *fortiori*. The proper view to take seems to be that if there is a suit for partition either at the instance of the widow or the instance of her husband's coparceners she must be considered to possess her interest as a separate coparcener and on her death whether pending the suit or after a decree for partition the interest of her husband which she had taken under the Act must be held to go to her husband's heirs and not to the other coparceners of the quondam undivided family. *Ramaswami*

(50) 1967 S.C. 232. See also *Controller of Estate Duty v. Alladi Kuppuswamy*, (1977) 2 S.C.J. 336. (1977) 2 J. (S.C.) 30. 1977 S.C. 2069.

(51) *Ibid.*

(52) *Ibid.*

(53) 1965 Orissa 73.

(54) 1958 Pat 20.

*Chetty v Lakshamma*⁵⁴, *Parappa v Nagamma*⁵⁵ which consider the law on the point contains the following passage on the question "Section 3 (2) of the Act does not bring about a severance of interest of the deceased coparcener. Certainly the widow is not raised to the status of a coparcener, though she continued, to be the member of the joint Hindu family as she was before the Act. The joint family would continue as before subject only to her statutory right. The Hindu conception that the widow is the surviving half of the deceased husband was invoked and fiction was introduced, namely that she continued the *legal persona* of her husband till partition. From the standpoint of the other members of the joint family, the right of survivorship was suspended. The legal effect of the fiction was that the right of the other members of the joint family would be worked out on the basis that the husband died on the date when the widow passed away. She would have during her lifetime all the powers which her husband had save that her interest was limited to a widow's interest. She could alienate her widow's interest in her husband's share; she could even convey her absolute interest in the same for necessity or other binding purposes. She could ask for partition and separate possession of her husband's share. In case she asked for partition, her husband's interest would be worked out having regard to the circumstances obtaining in the family on the date of partition. If she divided herself from the other members of the family during her lifetime, on her demise the succession would be traced to her husband on the basis that the property was his separate property. If there was no severance it would devolve by survivorship to the other members of the joint Hindu family. This conception of the *legal persona* of the husband continuing to live in her steers clear of many of the anomalies and inconsistencies that otherwise would arise. See also *Kelum; Dei v. Jagabandhu*⁵⁷ *Laxman v. Gangabai*⁵⁸, *Kedar Nath v. Radha Shyam*⁵⁹. See contra in *Bhagobai v. Bhayajal*.⁶⁰

Widow's share when determined⁶¹—The fact that one of the coparceners is dead leaving his widow who gets his interest under the Act does not put an end to the joint family or continuance of its property as joint family property and therefore the question of determining the extent of her share does not arise at the time of her husband's death and can arise only when the right to claim a partition is exercised either by her or by some other member of the family. It is therefore that date which is a crucial one for determining the quantum of interest or extent of her share. If on the date she exercises her right to partition new members have come into the coparcenary by birth or members have left it by death, her share will be calculated with reference to the number of members entitled to share on that date and not with reference to the members entitled to share on the date of her husband's death. [*Ramachandra v. Ramgopal*⁶², *Harekrishna v. Jyesthi*⁶³ *Parappa Nagamma*⁶⁴, *Gur Dayal v. Sarju*⁶⁵ *Nagappa v. Makumba*⁶⁶, *Gangadhar v. Subashini*⁶⁷

(55) 1962 2 Andh. W.R. 238.

(56) 1955 Mad 576.

(57) 1958 Ori.ssa 47.

(58) 1955 M.B. 138.

(59) 1963 Pat 81.

(60) 1957 M.P. 29.

(61) 1956 Nag 228.

(62) 1956 Ori.ssa 73.

(63) See f. n 56.

(64) 1952 N. 43.

(65) 1951 Bom. 309; I.L.R. (1951) Bom. 442.

(66) 1955 Ori.ssa 135.

*Sitamma v. Veeranna*⁶⁷ The Andhra High Court has in *Satyamurthy v. Sugunavathi*⁶⁸ held that the widow of a coparcener could not be deemed to be in a better position than her husband if he had lived and that her right to a share should be determined as on the date of her demand for partition and not as on the date of her husband's death because until a partition is demanded it is not possible to predicate the share to which she would be entitled under Section 3. In *Manicka Goundar v. Arunachala Goundar*⁶⁹, the Madras High Court has held that where a family consisted of the last surviving coparcener and the widow of a deceased coparcener, the half share of the surviving coparcener goes to his own heirs and not to the widow.

Widow and Illegitimate son of a Sudra—Prior to the Act on the death of a Sudra leaving a widow and an illegitimate son, the widow would receive half the property and the illegitimate son the other half. This is on the footing that an illegitimate son is entitled to take in the presence of the widow half the share which he would take if he were legitimate. But under the Act the widow herself should be treated as a son, and hence the illegitimate son's share is only one-fourth. If in addition to the widow and an illegitimate son there is a widowed daughter-in-law coming in as an heir under the Act, since both the widow and the daughter-in-law should be treated as sons, the illegitimate son's share will be half of one-third, that is one-sixth. In the same way should be calculated the shares of the widow and the illegitimate son where there are grandsons, or grand-daughters-in-law representing the lines of deceased sons. Again, before the Act, if a Sudra died leaving a widow, an aurasa son and an illegitimate son, the latter two succeeded as coparceners and, on the death on the aurasa son undivided without male issue, the whole property, was taken by the illegitimate son as against the widow of the putative father and the widow of the aurasa son. But under the Act, since the widow also succeeds as a son on the death of the aurasa son without male issue does not enable the illegitimate son to claim the entire property, but only to a share in it along with the widow in the proportion of 1 to 3, and if the aurasa son has left a widow, she is entitled to step into the position of the husband thus defeating the said right of survivorship of the widow and the illegitimate son. If in the above case the aurasa son has died divided from the mother and the illegitimate son, then the aurasa son's own heir, just as his daughter, daughter's son or mother, will succeed to his interest in the absence of his own widow.

Widow's share liable to fluctuation by survivorship.—In *Manicka Goundar v. Arunachala Goundar*,⁷⁰ A and B were brothers constituting a coparcenary. A died leaving a widow C and two days later B died unmarried leaving a sister D as his heir. D sold the property to the plaintiff and C sold the same property to the defendant. In a suit for possession or in the alternative for partition it was held: (i) that on the death of A his widow C succeeded to his interest in the family property under the provisions of the Act; (ii) that though C's interest would be a fluctuating interest if there was a coparcenary, since there was only one member of the coparcenary after A's death, namely B, on the latter's death his interest did not augment the interest of C, (iii) that on the death of B his heir, namely, his sister succeeded to his half interest and the plaintiff who was the purchaser of her share was entitled to maintain the suit for partition of her half share in the suit property. It may be pointed out by way of criticism in

(67) 1950 M. 785.

(68) (1961) Andh. Pra. 393.

(69) (1965) Mad 1 (F.B.).

(70) 74 L.W. 589; I.L.R. (1961) Mad. 1016; (1961) 2 M.L.J. 483.

that this decision ignores the right of *G* to take *B*'s interest by survivorship on *B*'s death. It has been however held in a later case that where a joint family was reduced to only two members the widow of a deceased coparcener and the last surviving coparcener, the death of the latter would result in his interest devolving on his own heirs and not by survivorship on the widow of the deceased coparcener *Manickam Gounder v. Arunachala Gounder*⁷¹. But see the observations of the Supreme Court in *Lakshmi v. Krishnammamma*⁷², where the Supreme Court points out the fluctuating nature of the widow's interest in the joint family depending on the births and deaths in the family and the changes in its fortune add the share of the widow at the partition being determinable with reference to the conditions existing at the time when the share has to be determined.

Widow's right to challenge alienation of family property—Since under Section 3 (2) the widow gets the same interest as her husband had, that interest includes the right to challenge an improper alienation by the managing member of the family without any necessity or benefit, because she having the right to partition and to get a share of the property undiminished except for proper reasons her right can be best protected only by her being conceded the right of preservation of the property with the concomitant right of challenging a non-binding alienation *Potharaju Papayamma v. Gopalakrishnamurthy*⁷³. She may not choose to file a suit for partition and that ought not to take away her right to see that the property in which she may claim a share when it suits her in future is left intact [*Ramalingam Pillai v. Ramalakshmi Ammal*⁷⁴, *Parvathamma v. Subudramma*⁷⁵]. In *Ramalingam Pillai's case*⁷⁶ a Hindu died leaving him surviving an undivided son, two unmarried daughters and a widow. His son alienated one of the properties. The widow filed a suit for partition and separate possession of her half share of the property and alleged that the alienation would not be binding on her. It was contended for the defendants that the widow was not entitled to challenge the alienation because she was not a coparcener and her only right in the Act was to take whatever property remained in the family and that she would not be entitled to question the alienation made by the sole surviving coparcener. In rejecting the contention the Court observed as follows: "We find that this point has been considered by other Courts which have all taken the same view as we are inclined to take. In *Sivappa Laxman v. Yellawa*⁷⁷ a coparcenary consisted of *S* and his son *L*. *L* died in 1945 leaving behind a widow *LW*. In 1946, *S* made a gift to his daughter of the major portion of the lands belonging to the joint family. After the death of *S*, *LW* adopted *P*. *LW* and *P* filed a suit challenging the gift on the ground that *S* was not competent to make a valid gift of the joint family property. It was held that when the gift was made by *S*, *LW* had a share in the properties under the Hindu Women's Rights to Property Act of 1937, and therefore *S*, although he was the sole surviving coparcener was not entitled to make the gift. It was contended before the learned Judges, *Gajendragakkar* and *Vyas, JJ.*, that the only effect of sub-Sections (2) and (3) of the Hindu Women's Rights to Property Act is in substance to give the widow a right to demand a partition and that until this right was actually exercised by the Hindu widow, the sole surviving coparcener could deal with the

(71) 1965 Mad. 1 (F.B.)

(72) 1965 S.C. 825.

(73) 1969 A.P. 341, cf., *Ahuja v. Rameshwar Lal*, 1971 Raj. 269.

(74) (1957) 2 M.L.J. 382; 70 L.W. 837.

(75) 1963 A.P. 236.

(76) 1954 B. 47

property in any manner he liked. That contention was repelled. Gajendragadkar, J., who delivered the judgment of the Bench said: "The position of a Hindu woman's interest in the family properties is, in our opinion, somewhat analogous to the undivided right of the coparcener at least so far as the manager's powers of management and alienation are concerned, so that if the said interest of the Hindu widow is sought to be defeated by an unjustified alienation, she would be entitled to challenge it just in the same manner as a coparcener would. It may be that the effect of this Act is not to cause the severance of status automatically on the death of a coparcener, and that the family may continue to be joint, in that case the manager would still be entitled to exercise his ordinary powers under Hindu Law. But it is clear that it is beyond the competence of a manager to make a gift of immovable properties belonging to the family."

The decision in *Ramasaran Rao v Bhagwa Shukul* takes the same view and in *Madhu Kashba v Gajrabai Shankar*⁷⁷ the decision in *Shivappa Laxman v Yellawa*⁷⁸ was followed. In *Uday Narain Rao v Dharmaraja*⁷⁹ a suit was brought on a mortgage executed by the manager of a joint Hindu family. One of the parties was the widow of a deceased coparcener who was entitled to an interest under the Hindu Women's Rights to Property Act and the question was whether she could put the plaintiff to proof that the mortgage was binding on the joint family property. The learned Judges held that she was so entitled. It is sufficient to cite the following passage in the judgment of Malik, C.J.: "Under the Hindu Women's Rights to Property Act, Smt. Muna Kuer has been given the same interest in the property as her husband had. It is not necessary to define the extent of that interest but there seems to be no good reason why she should not have the right to plead that the mortgage is not binding as it was not executed for legal necessity, that is to say, why she should not have the same right as her husband had of challenging the mortgage."

In that case the mortgage had been executed before the death of the widow's husband. In the case before us, a *fortiori* she would have such a right as the alienation was made long after her husband's death. In *Mst Gujarati v Mst Ramdev*,⁸⁰ the inequitable results which would follow by taking the other view are well pointed out. We entirely agree with the following observations of the learned Judges in that case:

"Even if it be conceded, as it must be, that the Act does not make the widow a Hindu law coparcener and does not invest her directly with the rights of a coparcener, the Act does confer upon her the same interest as her husband had subject to the limitation that the interest, so far as she is concerned, is the limited interest known as a Hindu woman's estate and that she has a right to claim partition as a male owner. After she has obtained partition, there could be no doubt that she as the holder of a Hindu woman's estate, would have full rights to protect that estate. Must the rights of protecting that estate be denied to her before she seeks partition? If so, her limited interest itself would be at the mercy of the coparceners. . . . If the rights under the Hindu Law which appertain to the surviving coparceners are such that they could destroy the limited estate itself of the widow by exercising those rights, then those rights must be curtailed in view of Section 2 of the Act. In this view the surviving coparcener would have no authority to do acts which would destroy

(77) 1954 B 442.

(78) 1954 B 47.

(79) 1 L.R. (1954) 1 All. 204.

(80) (1955) A L.J. 354.

the limited estate of a Hindu widow. On the other hand, the Hindu widow would be entitled to such rights as were necessary to protect the limited Hindu widow's estate which the statute creates for her

We agree with the learned trial Judge that both in law and in common sense the contention urged on behalf of defendants 1 and 4 that the plaintiff cannot challenge the alienation made by the first defendant in favour of the fourth defendant cannot be accepted." See also *Narain v Dhormaj* ⁸¹ *Gajarati v Ram* ⁸² *Shivappa Laxman v Yellawa*. ⁸³

An alienation by the manager for necessity of the family will be binding upon the widow of a coparcener, and the fact that the alienation was effected in pursuance of a decree passed against the manager in a suit to which the widow was not a party would not affect the validity of the same

Widow's right to partition—The widow being in the position of a coparcener in regard to her right to demand a partition as against the others who along with her have taken her husband's property all the rules applicable under the ordinary Hindu Law to a male coparcener's right to claim and obtain a partition of his interest are as much applicable to her right also.

Where a joint family consisted of two brothers *A* and *B*, and *A* died after the Act leaving behind his son, and *B* died subsequently leaving behind his widow *C* and a daughter *D*, and after *B*'s death his widow *C* brought a suit for partition and in that suit entered into a compromise under which *C* was given certain items of properties and she died in 1956 and the sons of *A* filed a suit for a declaration of title and possession of the properties left by *C* against her daughter *D*, claiming to be entitled to the properties by survivorship, it was held that the properties which fell to the share of *C* on partition devolved on *B*'s heir, namely, his daughter and hence the suit was not maintainable *Ramaswami v. Lakshminamma* ⁸⁴ See also *Manda v Pandrang* ⁸⁵ *Satughan v Sabujhuri* ⁸⁶ In *Jhanglu Shiocharan v Panchobai*, ⁸⁷ there was a partition between father and his son in which the two wives of the former did not claim any share. Subsequently the father and his first wife died. The surviving wife filed a suit for partition against her stepson claiming the entire half share of her husband which was allotted to him at the prior partition. It was held that she was entitled to that share on the ground that Section 3 (2) of the Act could be invoked in respect of the separated share of the father and that the case was not governed by Section 3 (1), *Venkatarao v Rajarao* ⁸⁸

Where a widow succeeding to the interest of her husband in a Hindu coparcenary effects a severance in respect thereof after the Act, the right of survivorship of the other members of the coparcenary is put an end to and on her death the heirs of her husband

(82) L.L.R. 1954 1 All. 204

(83) 1954 B. 47

(84) (1962) 2 An. W.R. 238

(85) 1968 B. 340.

(86) 1967 S.C. 272.

(87) 1968 M.F. 172

(88) (1967) 2 Andh. W.R. 141 (F.B.).

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would succeed to her interest and not the surviving coparceners. Any purchaser from her of that interest would also get a valid title to the same except when the sale is attacked successfully as without legal necessity *Ranu Thalu v Santu Goga*⁸⁹ See also *Bhuri Bai v Manohar Lal*.⁹⁰

Widow's maintenance —The maintainability or otherwise of a suit by a widow for her maintenance against her co-heirs who have taken her husband's separate property does not affect the maintainability of her suit for maintenance against her sons grounded on their personal liability to maintain her or against the legatees under her husband's will in case her reasonable maintenance cannot come from out of her share in his undisposed of separate property under this Act. Even where the husband has not disposed of any portion of his separate property by gift or will and he was not a member of a joint family, the separate property left by him is taken by his heirs subject to their obligation to maintain his widow in reasonable comfort and in this respect there is no difference between the obligation of the son or the widowed daughter-in-law

The mere fact that for some reason the widow who is given a right to ask for a share does not ask for it does not prevent her from claiming maintenance as a widow of a member of the coparcenery, *Varhat Amma v. Ammathali Naidu*⁹¹ The right to claim the husband's share in the family property given to her under the Act does not prevent her claiming maintenance but she will not be entitled to claim both the rights simultaneously *Basantha Mura v Lakshmi*.⁹²

Widowed daughter-in-law —Under the Act, the widowed daughter-in-law will take the property in preference to the mother of the last male holder.⁹³ Prior to the Act, on the death of her father-in-law his widowed daughter-in-law who during his lifetime had only a moral right to be maintained out of his self acquired property obtained a legal right to maintenance out of that property in the hands of his heirs. By obtaining under this Act the more concrete right to a share, her former right only to sue for maintenance must now be held to have been taken away. But this right to a share is only in respect of the separate property of the father-in-law left undisposed of by him.

Immorality and remarriage of daughter-in-law. —As in the case of the widow, so also in the case of the widowed daughter-in-law her unchastity does not prevent her from succeeding to the father-in-law's property, nor does her unchastity operate to entail the forfeiture of the share which she has taken. But if at the time the succession opened to her father-in-law she had already remarried, then she is not entitled to succeed to him because by her re-marriage she has ceased to be his daughter-in-law and hence cannot claim that relationship for purposes of claiming the succession. So also if subsequent to her succeeding to her father-in-law she contracts a re-marriage, she forfeits the interest which she has taken, for re-marriage, unlike, mere unchastity, takes her away from the family of her husband and brings into operation the general Hindu Law rule of forfeiture on re-marriage by the widow, and in this respect that the re-marriage has been according to the custom of the caste would not make any difference even though the provisions as to forfeiture in the Hindu Widow's Remarriage Act are not in terms

(89) 1961 Bom. 1 (F.B.).

(90) 1967 Pat. 323.

(91) 1959 A.P. 590.

(92) I.L.R. (1966) Cut. 926

(93) *Bhagwan v. Jai Dasa*, I.L.R. (1944) A 401; 1944 A. 224.

applicable to an estate inherited by a widow from a person other than the husband. The rules applicable to the devolution of the estate taken by the widowed daughter-in-law in case of her remarriage are the same as the rules applicable to the devolution of that estate in case of her death. In a case before the Calcutta High Court⁹⁴, it was held that the share taken by the widowed daughter-in-law would, on her death, devolve on the heirs of the father-in-law existing on the date of the daughter-in-law's death unaffected by the question whether the said heirs were in her husband's line or not. It is submitted that the correct way of distributing the daughter-in-law's share when there is a son to her husband, is to give that share to that son to the exclusion of the other heirs of the father-in-law.

THE EFFECT OF THE ACT AS REGARDS THE COPARCENARY INTEREST OF DECEASED HINDU

Position of the coparcener's widow—On the death of a Hindu as a member of a Mitakshara coparcenary, his widow takes his interest in the family property subject to the coparcenary incidents of the right of survivorship, right to claim partition and right to maintenance. The widow gets the right to demand a partition, but she cannot predicate the exact share which she might receive until partition, until partition is made her dominion extends to the entire property conjointly with the other members of the coparcenary, her possession and enjoyment is common, the property can not be alienated without the concurrence of all the members of the family except for legal necessity, and like other coparceners she has a fluctuating interest in the property which may be increased or decreased by deaths or additions in the family. It is manifest that she cannot have a right by birth because she enters the coparcenary long after she is born and on her husband's death. Thus short of this, she possesses all the indicia of a coparcenary interest. Though she cannot be a coparcener she has a coparcenary interest and she is also a member of the coparcenary by virtue of the rights conferred on her under the Act⁹⁵. The interest of the widow *vis-à-vis* her husband's undivided interest arises not by inheritance nor by survivorship but by statutory substitution⁹⁶. If the coparcenary ceases to exist by virtue of a partition among the coparceners during the lifetime of the widow, her interest becomes defined, which, on her death will not survive to the erstwhile coparceners⁹⁷. Unless the widow claims partition of the share to which her husband would be entitled had he been alive, her predeceased son's wife will be preferred to her own daughters.⁹⁸

Widow's liability for her husband's debts—The question of the widow liability for the husband's debts in case he has died as a member of a coparcenary is beset with doubts and difficulties but appears to depend for its determination on the circumstance whether he died leaving sons or not and whether the debt is a simple debt or a mortgage debt. If the debt is a valid mortgage debt then his share is taken by his widow burdened with the debt and is therefore liable for its satisfaction. But if the debt is a simple debt, then the share which she has taken in the family property is freed from the obligation of paying that debt if the coparcenary

(94) *Pravash Ch. Roy v. Prokash*, 50 CWN 659.

(95) *Controller of Estate Duty v. Alladi Kuppusamy*, (1977) 2 SCJ 336 (1977) 2 MLJ (SC) 30 1977 S.C. 2069.

(96) *Satraghan v. Sabunipari*, 1967 S.C. 252, *So'appa Mudaliar v. Meenakshi Ammal*, (1970) 1 MLJ 383.

(97) *Padmanabha v. Harganoni*, 1972 (1) CWR 775.

(98) *Anandi Devi v. Shyam Kishore*, 1973 All W.R. 523.

as a member of which he died consists of only his collateral relations, for in that case the rule of survivorship in favour of such relations defeats the creditor's right unless his interest has been attached during his lifetime in execution of a decree obtained in respect of that debt, and the fact that the personality of the husband is in a sense continued by the widow is no ground for holding that the husband's interest is still liable for his simple debt, inasmuch as to so hold would, instead of the Act operating in favour of the widow which obviously is the intention of the Act, make it operate to her detriment. The chief idea underlying the scheme of the Act is that the right to maintenance which the widow of a coparcener had prior to the Act must be converted into a right in specific property as a shareholder and if ignoring the fundamental foundation of the enactment one is to hold that her share would be liable for the simple debts of the husband, it would very often deprive her of her means of maintenance. For instance if a husband were to die leaving a widow and a debt of Rs. 4,000 and his share in the family property is worth, say, Rs. 3,000, then prior to the Act she would normally be entitled to claim maintenance from the husband's coparceners out of the income of this share, because they had taken that share freed from his debts as a result of the operation of their right of survivorship. If on the other hand it were held that that share should still continue liable for the debts then that share would be swallowed by the debts and nothing would be left from which the widow could get her maintenance. Having regard to the object and the scheme of the Act, this certainly cannot be said to be its proper interpretation. It has however been held that the interest of the husband taken on his death by the widow under the Act is taken by her not as a surviving coparcener in the husband's joint family but as his heir under a statutory provision and is liable for his simple debts though there had been no attachment and decree against him during his life-time.⁹⁹ But if the husband has left also sons, son's sons or son's son's sons, then her share must be held liable for the simple debts in the same way as her sons' shares would be. The contrary construction would place the widow in a more advantageous position, than that of the sons, for the sons would be liable for the debts under the pious obligation but the widow would not be liable, a result which it is difficult to hold is the intention of the Legislature. It may, however, be asked, why should a widow, or in a worse position when she has sons than when she has no sons? The answer, is otherwise there would be anomalies, and it is one of the fundamental canons of construction to interpret a statute in such a way as to avoid anomalous results. The construction favoured in the discussion here does not take away the rights of persons which they formerly possessed, and where possible secures to the widow the benefit intended by the Act. The position that in case the husband died as a coparcener leaving a widow and no sons the husband's share in the widow's hands is not liable for the simple debts of the husband in respect of which no decrees had been obtained and no attachments effected during his lifetime, while operating beneficially to the widow does not take away any right which the creditors formerly had, for, the creditors formerly had none as on the death of the coparcener his interest in the family property became freed from the obligation of paying those debts as a consequence of the existence of the right of survivorship of the other coparceners. So also the latter position of the liability of the widow's share for those debts in the presence of the sons, while not taking away any right of the widow which she formerly possessed, leads to the reasonable construction that the sons should not be

(99) *Saradambal v. Subbarama*, I.L.R. (1942) M. 630 1942 M. 212 54 L.W. 651 (1941) 2 M.L.J. 862, *Veethavar v. Hay Narain*, 23 Pat. 760 1945 Pat. 116, *Shankar v. Gangaram*, (1952) Bom. 127; *Co-operative Society Union, (1946) Nag. 434* [In view of the decisions in *Sairughan's case*, 19 7 S.C. 232 and *Controller of Estate Duty v. Alladi Kuppuswamy*, 1977 S.C. 206], the assumption that the widow takes under the Act as the husband's heir and is therefore liable for his debts is not warranted.]

placed in a worse position than the widow. The nature of the right which the widow gets being the limited interest with all its incidents in the hands of the widow inheriting that interest it is open to her to alienate her own undivided interest in the joint family property and if such alienation is not for necessity approved by the Hindu Law it will be valid for her lifetime. *Mahapat v Ganpath*.¹⁰⁰ In *Narayan Vadrav Katti v Belgaum Bank*¹⁰¹, it was held that when a Hindu died leaving sons and a widow and his creditor filed a suit and obtained a decree against the sons only in respect of the assets of the father in their hands, the said decree would not be binding on the share of the widow in the husband's property.

Alienation by widow—The interest which the widow of a deceased coparcener takes in the share which she gets under the Act is the limited interest of a female heir under the Hindu Law, and she can therefore alienate her share only for necessity or benefit, the words necessity and benefit including spiritual purposes as considered in Chap XVI. Even the fact that a simple creditor of her husband has lost his remedy as a result of the operation of survivorship in favour of the surviving coparceners of her husband would not preclude her from alienating her interest for the purposes of satisfying such a debt, for such act of the heirs is considered by the religious law of the Hindus as conceived in the interest of the departed soul of the husband and certainly does not stand on a worse footing than the barred debt of the husband which the law says a Hindu widow can discharge by an alienation of the husband's estate. In a case where the surviving coparceners of her husband include his own sons, then necessarily the number of the purposes which would justify her alienation would be less by reason of the existence of the sons who would be the more proper persons to meet the expenses and perform the acts in connection with those purposes, as, for instance, the *shradh* of the father or the marriage of his daughter, etc., and though even here the widow would be liable to rateably contribute to the sons from her own share, she cannot alienate her interest for a purpose which is more the concern of her sons. When she validly alienates her interest, the alienee is only entitled to her share as it stood on the date of the alienation and not to any augmentation which her share would have received subsequently by reason of any death in the family, such addition to that share ensuing only to the benefit of the widow and not to the alienee.

Apostasy of the widow—Under the strict Hindu Law the apostasy of the widow would operate as a forfeiture of her right to succeed to the property of another Hindu, because by her conversion from Hinduism she has ceased to be a Hindu so as to render that law inapplicable to her. But this rule of Hindu Law was abrogated by the Caste Disabilities Removal Act and is no longer in force. But that Act, while it removed a disability, did not confer any new right to the apostate. The question then is whether this Act which confers new rights can be so construed as to permit a widow who has become an apostate to Hinduism to claim such rights. The answer would appear to be in the negative. The Act applies to Hindu women, or to be more accurate to Hindu widows. If at the time the succession opens she has embraced some other faith, it is impossible to say she is a Hindu for the purpose of the applicability of the Act. To hold that conversion of a widow from Hinduism would not operate as a bar to her succession under the Act would lead to the position of daughters-in-law and grand-daughters-in-law who, prior to the opening of the succession had become converts to Christianity or Mahomedanism, claiming successfully to succeed to the property of a Hindu, a position which is sure to be abhorrent to all social and religious sentiments of the Hindus which no reasonable man would attempt to bring about. Therefore the proper construction of the

(100) 1963 Patna 277

(101) (1968) 2 Mys L.J. 66,

Act would be that an apostate widow or daughter-in-law would not be entitled to claim the benefit of this Act since she is not a Hindu woman to whom alone the Act is applicable.¹⁰² But if at the time of the opening of the succession she had reverted to Hinduism from the religion to which she had previously gone over and such reversion has been in conformity with the notions of the community to which she belongs and is sanctioned by such religious ceremonies as have been prescribed by that community, it would appear that there is nothing to prevent the reconverted widow from claiming the benefit of the Act as a Hindu widow with the meaning of the Act.

(102) Cf. *Sasibku v. Amiya*, (1974) 78 Cal WN 1011 where a Christian woman who had married a Hindu under the Special Marriage Act, 1872, was considered entitled to a share as a predeceased son's widow in her Hindu father-in-law's property as heir under the Hindu Women's Rights to Property Act, 1937.

EPITOME

SOURCES AND OPERATION OF HINDU LAW

Sources of Hindu Law—Hindu Law was not promulgated by any sovereign but is based essentially on immemorial custom. It is a body of principles or rules recognised and allowed by the sovereign to govern the subjects and inasmuch as what a sovereign can alter, but is not altered by him, can be taken to have been commanded by him, Hindu Law which has been allowed by the rulers of the past to govern the subjects may in a qualified sense, be taken to have been promulgated by the sovereign within Austin's definition of Law. The Hindu Law as administered to-day can be traced to one or other of the following sources:

1 The *Śruti*, meaning what was heard by the sages. This includes the four Vedas and is practically of no legal value. The four Vedas are the Rik, Yajur, Sama and Atharvan. Each of these consists of two parts, known as *Samhita* and *Brahmana*, the *Samhita* being a collection of *Mantras* or hymns in praise of the Almighty, and the *Brahmana*, being the theological expositions of the *Mantras*. The intricacy and complexity of the *Brahmanas* necessitated their condensation and the *Sūtras* came into existence by which the Vedic lore was analysed and digested under proper headings in the form of aphoristic rules known as *Smritis*. The *Sūtras* fall into three classes known as *Śrauta Sūtras* dealing with the rituals, *Grhya Sūtras* dealing with domestic ceremonies, and *Dharma Sūtra*, dealing with law. Of these the last alone are useful as a source of law.

2 The *Smṛiti*, meaning what was remembered. The *Smritis* constitute the principal source of Hindu Law. The *Smritis* are divided into Primary *Smritis* and Secondary *Smritis*, the latter being later in date than the former. The Primary *Smritis* are again classified into *Sūtras* and *Dharma sastras*. *Gautama*, *Baudhayana*, *Apastamba*, *Vasishtha* and *Vishnu* are the chief *Sūtra* writers, while *Manu*, *Yajñavalkya*, *Nārada* and *Parasara* are the most noteworthy of the writers of the *Dharma sastras*. *Parasara Smṛiti* is supposed to be specially applicable to the present age of *Kalyuga*.

3 *Commentaries*.—The most important of the commentaries are

- (a) *The Mitākṣhira* by *Vijñāneśwara*. This is the most important commentary on *Yajñavalkya Smṛiti* and is the prevailing authority in Southern India, the *Mahratta* country, the Northern *Canara* and *Ratnagiri*.
- (b) *The Dayabhaga* by *Jīmūtavahana*. This is the paramount authority in *Bengal*.
- (c) *Mayukha* by *Nīlakanta* is the chief authority in the Island of *Bombay*, Northern *Konkan* and *Guzerat*.

In addition to the above there are many other treatises. Two chief treatises on adoption are the *Dattaka Chandrika* written by *Kubera* and *Dattaka Mimamsa* written by *Nandapandita*. These are respected throughout India and in the case of conflict between them, the former is preferred in *Bengal* and *South India* while the latter is preferred in *Benares* and *Mithila*.

4. *Legislation*.—Much of the Hindu Law as administered nowadays is to be found in the several enactments passed by the legislatures of our country, e.g., *Caste Disabilities*

Removal Act of 1850, Hindu Widow's Remarriage Act of 1856, Native Convert's Marriage Dissolution Act of 1866, Majority Act of 1875, Hindu Disposition of Property Act of 1916, Hindu Inheritance (Removal of Disabilities) Act of 1928, Hindu Law of Inheritance (Amendment) Act of 1929, Child Marriage Restraint Act of 1929, Hindu Gains of Learning Act of 1930, Hindu Women's Rights to Property Act of 1937, etc.

5. *Judicial decisions*—The Hindu Law as found in the original Sanskrit texts has been in several respects modified or added to by the Judges applying the principles of equity and good conscience. Instances of such modification are to be found in the recognition in some of the Provinces of the coparcener's power to alienate his interest in the joint family property, the limiting of the pious duty of the son to pay his father's debts to the actual ancestral assets in his hands and the restricted definition given to "stridhana"

6. *Custom*—Under Hindu Law clear proof of usage or custom will outweigh the written text of the law.¹ A custom to be recognised must be ancient certain, continuous and invariable and being in derogation of the general rules of law must be strictly proved.² A custom which is either immoral or opposed to public policy or is forbidden by statute is not valid. Custom is of three kinds (i) local custom, (ii) class custom, and (iii) family custom. But a family custom unlike that of the locality or class can be discontinued by the concurrent will of the members of the family,

Schools of Law—Strictly speaking there are only two schools of Hindu Law, the Mitakshara and the Dayabhaga, the others like the Dravida, the Mithila, the Benares and the Maharashtra schools being really the sub-schools of the Mitakshara differing from one another only in minor matters. The remote sources of law are common to all the schools but the subsequent commentators put their own gloss upon the ancient texts with the result that several schools with conflicting doctrines came into existence owing to some of the Provinces accepting the commentary of a particular writer with others rejecting it and adopting the explanation of another commentator. Thus, though both the Mitakshara and the Dayabhaga equally admit the authority of Yajñavalkya, they differ fundamentally even on principal matters. In like manner there are sub-schools of the Mitakshara owing to differing glosses and commentaries placed thereon by subsequent writers in the several Provinces acknowledging the Mitakshara as their authority.

Difference between the Mitakshara and Dayabhaga Schools

<i>The Mitakshara</i>	<i>The Dayabhaga</i>
(1) A son gets a right by birth in the ancestral property	(1) No such right
(2) A son can demand partition against his father	(2) No such right
(3) A son can restrain unauthorised alienations by father.	(3) No such right.
(4) No absolute right of alienation in a brother of his share.	(4) Such right exists.

(1) *Collector of Madras v. Mestree Rimalings*, 12 M.I.A. 397.

(2) *Abdul Hussain v. Bhai Sona*, 45 I.A. 10; 45 C. 450.

The Mitakshara.

The Dayabhaga.

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| (5) A joint brother's share survives, on his death without male issue, to his other brothers | (5) No survivorship. |
| (6) A widow of a deceased coparcener cannot enforce partition* | (6) She can |
| (7) Propinquity is the chief test of heirship. | (7) Religious efficacy is the test |

Interpretation of texts—The ancient books mingle religious and moral considerations with rules intended for positive laws and great caution is necessary in interpreting them. The *Mimamsa* of Jaimini embodies some valuable rules of interpretation and one such rule was alleged to have the effect that a text supported by the assigning of a reason is to be deemed not as mandatory, but only as recommendatory. But there is no such rule in the *Mimamsa* and the rule which was alleged to have the above effect had been misinterpreted by Mr. Mendlik, and the alleged rule was characterised by the Privy Council as startling in *Balusu's case*,⁴ when they had to interpret Vasishtha's text "Let no man give or receive an only son, since he must remain to raise up a progeny for the obsequies of ancestors". Besides, such an interpretation is unwarranted, as, in the case of texts which are held inspired, both the reason and the rule must have equal authority. It is impossible to imagine how an imperative order becomes merely a persuasive advice simply because a reason has been appended to the order.

There is a good deal of conflict and inconsistency in the *Smritis* and between one *Smriti* or *Smriti* and another. *Yajnavalkya* resolves the conflict by attributing to the *Smriti* an authority superior to the *Smriti* and by assuming different cases or customs for the application of the conflicting precepts. In the event of a conflict between the ancient texts and the commentaries the Privy Council has held that it is the opinion of the commentators that must be preferred.⁵

Factum valet—The doctrine of *Quod Fieri Non Debet Factum Valet* which means that a thing when done is valid, though it ought not to have been done, has been applied by the British Indian Courts in the administration of Hindu Law on grounds of justice, equity and good conscience. The applicability of this doctrine is confined only to the violation of moral precepts and cannot be availed of to cure the violation of a mandatory text of the Hindu Law, such as the text against the adoption of an orphan. The precept against the adoption of an only son or the eldest son has been held to be only a moral precept so as to render the adoption valid by the application of the doctrine of *factum valet*.

Operation of Hindu Law—The term Hindu can safely be applied to all those who claim and are regarded as Hindus by the society surrounding them. They are divided into four castes, called the Brahmin or the priestly caste, the Kshatriya or the warrior caste, the Vaisya or the trading caste and the Sudra or the servitor caste. The first three are called the twice born or regenerate castes, and all the castes are governed by a religion which may be compendiously called Hinduism. Hinduism is a mass of fluctuating beliefs and opinions and

(3) She is now given that right under the Hindu Women's Rights to Property Act, 1937.

(4) *Sri Balusu v. Sri Balusu*, 22 M. 398 26 L.A. 115 (P.C.).

(5) *Almaraz v. Aguirre*, 62 L.A. 139.

holds within its ambit men of divergent views and traditions who have nothing in common except a vague faith in what may be called some of the fundamentals of the Hindu religion. Hindu Law applies not only to the persons who were born in the Hindu religion and continue to remain within its fold, but even to persons who become converts to Hinduism from other religions.⁸ It applies to all Hindus, whether of Aryan or non-Aryan stock, whether orthodox or heterodox,⁹ whether conformists such as the orthodox Brahmans or dissenters such as the Jains, the Sikhs, the Brahmos, the Lingayats and the Arya Samajists, whether legitimate or illegitimate by birth, provided in the case of a person illegitimate by birth either both the parents are Hindus, or at least the mother is a Hindu and the child is brought up as a Hindu.¹⁰ But a person who is a Hindu by birth cannot, after his conversion to some other religion, claim to be governed by Hindu Law unless he has become reconverted to Hinduism, and the decision in *Abraham v. Abraham*,¹¹ that a Hindu in spite of his conversion to Christianity can still choose to be governed by Hindu Law is of no authority after the passing of the Succession Act of 1865.¹² But in the case of some of the Hindu converts to Mahomedanism, such as the Khojas, the Sunni Borahs, Molesalem Girasias, Cutchi Memons, Nassapoori Memons and Halai Memons, the rule of Hindu Law excluding females from succession, though not in accordance with the precepts of the Koran, has been engrafted as a custom on the Mahomedan law.¹³

Effect of conversion from Hinduism.—A Hindu by becoming a convert to Mahomedanism or Christianity is bound by the law of the new religion which he has embraced, namely, the Mahomedan Law or the Succession Act, as the case may be, and cannot claim to conform to the Hindu Laws and usages. If at the time of conversion he is a member of a Hindu joint family, he becomes at once severed as an outcaste from the family and the tie which bound him to the family becomes dissolved with the result that the obligations consequent upon and connected with that tie also become dissolved with it.¹⁴ The forfeiture of civil rights imposed by the ancient texts upon a convert from Hinduism was done away with by the Caste Disabilities Removal Act of 1850 which saved such rights with the result that, on conversion, a member of a Hindu joint family walks out of the family as a divided member taking his share in the family property. But this Act does not enable a convert to free himself from the obligations imposed upon him by the Hindu Law prior to his conversion.¹⁵ Thus conversion does not put an end to his liability to maintain his aged parents or infant children. Nor does the above Act enlarge the convert's interest in any property or get rid of any condition or restriction to which it was originally subject, e.g., a member of a Malabar tarwad was held not entitled to claim partition of the tarwad property on the ground of conversion, because under the Malabar law no member of the tarwad is entitled to a separate share of the tarwad property.¹⁶ Besides, the Act operates only to benefit the apostate and not his

(6) *Kemawats v. Digbya Singh*, 48 I.A. 381 43 A. 525; *Sahadeo v. Kusum Kumari*, 50 I.A. 58; *Moraji v. Administrator-General*, 52 M. 160.

(7) *Bhagwan v. Bose*, 30 I.A. 249, 31 C. 11.

(8) *Myna Boyer v. Qalaram*, 8 M.I.A. 400; In the matter of *Ram Kumari*, 18 C. 264.

(9) 9 M.I.A. 195.

(10) But now after the Cutchi Memons Act of 1938 Cutchi Memons are governed by Mahomedan Law even as regards succession.

(11) In re *Ram Kumari*, supra.

(12) *Paru v. Ramas*, 44 M. 691 (F.B.), but now after the Madras Marumakkattayam Act a partition of the tarwad property can be enforced.

descendants in the new faith or his relations in the old.¹³ In the case of a husband's conversion from Hinduism to Christianity he can get his marriage dissolved under the Native Converts Marriage Dissolution Act of 1866 and thus terminate his obligation to maintain his Hindu wife under an order of Court.

Migrating families.—Every Hindu is governed by the law of his personal status and carries that law with him wherever he goes.¹⁴ The law of the Province wherein he resides *prima facie* governs him, but if it is shown that he came from another Province the presumption is that he is still governed by the law which obtained in his original Province at the time of his migration.¹⁵ But where a family migrates to another country and is shown to have so acted as to cut itself off from its old environment, a presumption that it has adopted the law of the people among whom it has newly settled is more readily drawn.¹⁶

MARRIAGE AND SONSHIP

Nature of marriage.—Marriage is an essential sacrament with the Hindus, regarded as a holy union between a man and a woman for begetting a son necessary for spiritual salvation and for performance of religious rites. It is not a civil contract and neither minority nor any disability, physical or mental (barring perhaps total lunacy) of either the bride or the bridegroom operates as a bar to a valid marriage. There was no objection to a person having any number of wives, but polyandry was prohibited by Hindu Law.

Capacity to give in marriage.—According to the Mitakshara, the order of persons authorised to dispose of a girl in marriage was (i) the father, (ii) the paternal uncle, (iii) the brother, (iv) other paternal relations of the girl in the order of kinship and (v) the mother; according to the Dayabhaga, the maternal grand-father and the maternal uncle came before the mother. This order of guardianship for the purpose of the marriage of a girl was only directory and not mandatory and did not affect the legal rights vested in the mother as the girl's legal guardian to select a husband for her and give her in marriage to him even in the presence and without the concurrence of the preferential guardians mentioned in the above order. Hence a marriage will not be invalidated merely because the girl had been given away by the mother without the consent of the father.¹⁷ The doctrine of *factum valet* applies in such a case to cure the want of consent of the preferential guardian. But so long as the marriage has not been performed and the matter is still in the stage of negotiation and contract, a preferential guardian is entitled to sue to restrain by an injunction the attempt on the part of an unauthorised person to give the girl away in marriage. The Court had jurisdiction to interfere to prevent a marriage taking place, even if it was contemplated by the proper guardian, if the marriage is shown to be prejudicial to the girl's interests. If the marriage has been brought about by force or fraud, there is jurisdiction in the Court to declare it void even though it has been performed with sastric ceremonies, as there has been really a fraud on the policy of religious ceremony.¹⁸

(13) *Mitter Sen v. Magbul*, 57 I.A. 513.

(14) *Parbati v. Jagadiz*, 29 I.A. 82, 29 C. 433.

(15) *Bahmani Rao v. Baji Rao*, 46 C. 30 (P.C.).

(16) *Abdur Rahim v. Halimabai*, 43 I.A. 35.

(17) *Pankajcharyulu v. Rangacharyulu*, 14 M. 316.

(18) *Ankamma v. Ramappa*, (1947) 1 M.L.J. 192, *Pankajcharyulu v. Rangacharyulu*, *supra*.

Forms of marriage.—Originally eight forms of marriages were recognised by the ancients, namely, the Brahma, the Daiva, the Arsha, the Prajapatya, the Asura, the Gandharva, the Rakshasa and the Pisacha and of these the first four were the approved forms and the last four unapproved. Forms of marriage other than the Brahma and the Asura have become obsolete.

The Brahma and the Asura forms of marriage—The Brahma and the Asura, which were respectively the most respectable of the approved and the least objectionable of the unapproved forms of marriage were the only forms now recognised among all classes. The presumption ordinarily is that a Hindu marriage is in the Brahma form. "The gift of a daughter clothed only with a single robe, to a man learned in the Vedas, whom her father voluntarily invites and respectfully receives, is the nuptial called Brahma." "When the bridegroom, having given as much wealth as he can afford to the father and paternal kinsmen and to the damsel herself, takes her voluntarily as his bride, that marriage is named Asura." Though the Brahma form, from the description given above of the bridegroom as one learned in the Vedas is strictly speaking inapplicable except in the case of Brahmins, it is now practised by all castes. The chief difference between this form and the Asura is that in the former the parents of the bride do not receive any consideration for giving the girl in marriage, while the receipt of pecuniary benefit by the bride's parents, is the striking feature of the latter. Even the defraying by the bridegroom of the expenses of the marriage which the girl's father is in law bound to meet will make the marriage one in the Asura form.¹⁹ But the mere fact that the bridegroom gives the bride or her mother a present as a token of compliment or defrays the expenses of the marriage voluntarily in accordance with the caste custom and not in pursuance of a contract with the bride's father²⁰ does not render the marriage one in the Asura form.

Marriage ceremonies—The ritual of every Hindu marriage consists of three stages: (i) the betrothal (ii) the recitation of holy texts before the Sacred Fire and (iii) the *Saptapathi*. Of these it is the *Saptapathi* or the taking of the *Seven steps* by the bridal pair in the marriage ceremony that makes the marriage complete and irrevocable, the earlier two stages being merely those of preparation when the parties can rescind from the transaction. Consummation is not necessary for a valid marriage and even the above ritual need not be gone through in the case of those communities amongst whom some other form equally effective to complete a marriage prevails by force of custom.

Capacity to marry—Though neither minority²¹ nor any of the physical defects barring total lunacy²² operated as a disqualification for contracting a valid marriage, Hindu Law prescribed certain rules which should be observed for recognising a marriage as valid. The rules are (i) that the bride and the bridegroom should belong to the same caste, (ii) they should not belong to the same *gotra* or *pravara*, (iii) they must not be within the prohibited degrees of relationship.

(19) *Rashammal v. Somasundara*, 41 M.L.J. 76; *Sreeni Asuri v. Anand Ammal*, 59 M.L.J. 553.

(20) *Srinagam v. Ambalavanam*, 47 L.W. 700.

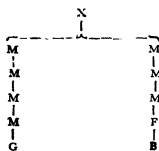
(21) The Child Marriage Restraint Act which penalises marriage of boys below 18 (now 21) years of age and girls below 14 (now 18) years of age does not make the marriage invalid.

(22) *Mari Lal v. Chandrakshi*, 58 C.L. 700.

(i) *Inter-caste marriages*.—The first rule is that the parties to a marriage must not belong to different castes. This rule does not invalidate a marriage between persons belonging to different sub-divisions of the same caste.²³ Even in the case of marriages between persons belonging to different main castes, all such marriages were not invalid. Such marriages are of two kinds, (i) *Anuloma* and (ii) *Pratiloma*. An *anuloma* marriage is one between a man of a higher caste and a woman of a lower caste, while a *pratiloma* marriage is that between a woman of a higher caste and a man of a lower caste. *Pratiloma* marriages were absolutely void, but *anuloma* marriages, though rare and not quite approved, have been held in some cases as not invalid.²⁴ A convert to Hinduism from another religion should be considered as a Sudra for purposes of ascertaining his or her caste.²⁵ An illegitimate person is not prevented from concluding a valid marriage in the caste to which he or she is considered as belonging by the members of that caste.²⁶

(ii) *Gotra and Pravara*.—Every twice born or person belonging to the first three castes owns a *Rishi* or *Sage* as the founder of his family or *gotra*. *Gotrajas* are persons who claim to be descended in the male line from one of the ancient sages after whose name the *gotra* is named, and who is either a descendant of or himself one of the eight accredited progenitors of the human race, namely, Agastya, Atri, Bharidwaja, Gautama, Jamadagni, Kashyapa, Vasishtha and Viswamitra. The three lineal male ancestors of the founders of the *gotra* are referred to as *prapara*. The rule is that persons of the same *gotra* or *prapara* cannot contract a valid marriage between them and such a marriage is wholly void.²⁷

(iii) *Prohibited degrees*.—The rule relating to prohibited degrees is that no two persons one of whom is related to the other as *sapinda* can validly marry each other. According to the Mitakshara, the *sapinda* relationship comprises all descendants up to the 7th degree through male or female links of paternal ancestors upto the 7th degree and such descendants upto the 5th degree of maternal ancestors upto the 5th degree.



In this diagram X represents the common ancestor G, the girl a d B the boy, M stands for a male ancestor and F for a female ancestor. In computing the degrees, the person concerned and the common ancestor should each be counted as one degree. The girl being related to the boy through his mother, she is not the *sapinda* of the boy since she is descended from a common ancestor who is beyond the 5th degree counting from B as degree one. But being related to G through her father, he is related to G as *sapinda*, because he is one of the descendants within the 5th degree of the common ancestor X who is also within the 7th degree from the girl G. In this connection it may be interesting to consider the doctrine of *Jug's loop* under which the *sapinda* relationship springs into existence between two persons between whose parents the relationship does not exist. This anomaly which

prohibits a valid marriage between two persons whose parents, though more closely related to each other, could have validly married can be best illustrated by the following diagram.

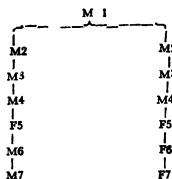
(23) *Indram v. Ramaswamy*, 13 M.L.A. 141; *Copi Krishna v. Mt. Juggo*, 58 A. 397 (P.C.).

(24) *Moraji v. Administrator-General*, 52 M. 160.

(25) *Ibid.* *Mahagami v. Maslamoney*, 33 M. 342.

(26) In the matter of *Ram Kumar*, 18 C. 264; *Emperor v. Madho Gopal*, 34 A. 589; *Ben Gaiob v. Jitmalal*, 46 B. 871.

(27) *Ramchandra v. Gopal*, 32 B. 619.



It will be seen in this diagram that M6 (male) and F6 (female) could have contracted a valid marriage between themselves because both of them being related to each other through their mothers, neither of them is the *sapinda* of the other applying the relevant five degrees rule. But M7 and F7 cannot marry each other because, even though M7 is not the *sapinda* of F7, F7 is really the *sapinda* of M7 and hence cannot be married to him.

Under the Dayabhaga, the rules for ascertaining the *sapinda* relationship are more cumbersome, though they substantially agree with the rules of computation according to the Mitakshara. The Dayabhaga, however, validates a marriage between persons, though within the prohibited degrees, if the girl is removed by three *gotras* from the boy.

Operation of the prohibitory rules—Persons who want to marry each other, though belonging to different castes, can effect a valid marriage, whether *anuloma* or *pratiloma* under the Special Marriage (Amendment) Act of 1923, though such a marriage affects materially the position and rights of the husband under the Hindu Law. The prohibitory rule regarding *pravara* and *gotra* does not apply to the Sudras, as they have no *gotra* or *pravara*. But the rule relating to *sapinda* relationship applies to all castes. When a marriage has been effected in violation of these rules, the girl does not obtain the status of a wife, nor can she re-marry. But she is entitled to be maintained by the person who was the author of her unfortunate position, namely, her supposed husband.²⁸

Legal effect of marriage—Once a marriage becomes complete, it becomes indissoluble. The husband becomes the guardian and protector of his wife and is entitled to the enjoyment of her person and society. He is entitled to succeed to her property if she predeceases him without issue, and can utilise her Stridhana property to relieve himself in circumstances of extreme distress. As regards the wife, she is entitled to be maintained by her husband and given the conjugal privileges which every woman expects from her husband. Either spouse can bring a suit for the restitution of conjugal rights, but such a suit by the husband can be resisted by the wife by proof of (1) his habitual cruelty, (2) loathsome disease, (3) conversion to another religion or, (4) outrage to her feelings by his keeping a concubine in the same house. But defences such as the minority of the wife, or the infidelity of the husband will not avail the wife to resist the husband's suit for restitution of conjugal rights.

Breach of marriage contract—A contract to marry cannot be specifically enforced, nor will any of the parties be restrained by an injunction from marrying another.²⁹ But when the contract is broken, damages are awardable against the guardian to the party aggrieved by the breach and a plea that the boy or girl refuses to marry is no defence to the action.³⁰ When the contract has been broken on justifiable grounds, as for instance, discovery of the chronic ill-health of the boy, only the actual expenses incurred during the betrothal are recoverable.

Marriage expenses.—Under the Mitakshara the marriage expenses of the male members of a joint family and of their daughters are borne by the family property so long

(28) *Ramchandra v. Gopal*, 32 B. 619.

as the family is joint. Even when a son institutes a suit for partition against his father and brothers, his share in the family property cannot escape liability for share in the expenses of the marriage of his sister who was married after the institution of the suit and of those sisters who are still to be married. In such a case the share of the plaintiff's brother or father will not be liable for the expenses of the future marriage of the plaintiff's daughter. Again, the rule that provision should be made on partition for the expenses of future marriages in the family does not apply in the case of unmarried male members of the family.²⁹

Divorce—Except when sanctioned by custom³⁰ or under the Native Converts Marriage Dissolution Act of 1866 when one of the spouses becomes a convert to Christianity, no divorce is valid as between Hindus. Even when sanctioned by custom, the custom will not be recognised if it allows the wife to desert her husband and marry another at her pleasure and without the consent of her first husband.³¹

Marriage of widows.—A Hindu widow who formerly could not, except when sanctioned by custom, contract a second marriage, can now lawfully marry under the Hindu Widows Re-marriage Act of 1856, but she forfeits on such marriage any right or interest which she may have in her first husband's property.

Customary and statutory forms of marriage—In addition to the forms of marriage known to the Sastras, there were certain customary marriages in vogue, such as Phoolbibaha, Dang Marriage, Santigraha Marriage, Sarvaswadhanam Marriage and Sword Marriage. The *Statutory Marriages* were those under the Anand Marriage Act of 1909, Malabar Marriage Act of 1896, Hindu Widows Re-marriage Act of 1856, the Special Marriage Amendment Act of 1923, and Arya Marriage Validation Act, 1937.

Kinds of sons.—In ancient days when society was very much unsettled and the relationship between men and women was very loose, all kinds of sons, some of whom were not the sons of the father and others not even born to his wife, were recognised for the protection of his own house and land of which, in the absence of men superior in strength and number, he was often threatened with deprivation by his neighbours. But with the settlement of the society to peace and order all the sons excepting the aurasa, the adopted, and the concubine's sons had become obsolete.

Position of an illegitimate son—In the first three castes an illegitimate son was only entitled to maintenance and cannot inherit to his putative father. But amongst Sudras, if the illegitimate son was born to a permanently and exclusively kept concubine and was not the offspring of an incestuous or an adulterous intercourse with a married woman, he got a heritable capacity in respect of the estate of his Sudra putative father if the latter died divided from his brothers or leaving separate property. But if the connection, though adulterous at the beginning, ceased to be such at the time the illegitimate son was conceived, his heritable capacity was not affected. This heritable capacity was confined to the estate of his

(29) *In re Ganpat*, 1 C. 74.

(30) *Parashottam v. Parashottam*, 21 B. 23.

(31) *Subbaya v. Ananta*, 53 M. 84 (F.B.), *Ramalinga v. Narayana*, 45 M. 489 (F.C.).

(32) *Banaralingam v. Subban*, 17 M. 479.

(33) *Narayan v. Laxmi*, 2 B. 140.

putative father and did not enable the illegitimate son to succeed to the father's ancestors or descendants or collaterals ³⁴. Nor was he entitled to claim his father's share when the father died undivided from his own brothers or other collaterals ³⁵. The illegitimate son's right to succeed to his putative father was one transmissible to his male issue and hence in a competition between a divided brother of the father and a son of an illegitimate son, the latter would exclude the former ³⁶.

Extent of his heritable right—An illegitimate son did not get any interest in the father's property so long as the father was alive. But on the death of the father divided from his collaterals and leaving neither an aurasa or adopted son, nor a widow, nor a daughter or daughter's son, the illegitimate son was entitled to succeed to the whole estate of the putative father. But if any of these existed he would be entitled to get half of what he would have taken had he been legitimate ³⁷. Where a Sudra father died leaving legitimate and illegitimate sons and they continued undivided, then on the death of the legitimate son without male issue, the illegitimate son would take the whole property by survivorship even excluding the legitimate son's daughter or widow ³⁸. An illegitimate son was also entitled to inherit to his mother in respect of her Stridhana property if she had no legitimate issue.

Succession to illegitimate son—A putative father can succeed to his illegitimate son among the Sudras, but a legitimate son cannot inherit to the illegitimate son ³⁹. So also the mother or sister of an illegitimate son can succeed to him ⁴⁰.

ADOPTION

What is adoption—Adoption is the formal affiliation as a son of a person, of one who was in fact not his son, and was resorted to satisfy the desire of a sonless Hindu to perpetuate his family name and to be saved the superstitious torments of the next world by leaving a child in this ⁴¹.

Who can adopt—Every sonless Hindu, "sonless", meaning without a son, grandson or great-grandson aurasa or adopted, be he a bachelor, a married man or a widower, can make a valid adoption to himself, provided that at the time of adoption he had arrived at the age of discretion and can understand the nature and effect of his act. But the mere physical existence of a son, grandson or great-grandson was not sufficient to preclude the father from making a valid adoption if the son was incapacitated from offering spiritual benefit by asceticism, apostasy, illegitimacy or any physical or mental defect such as virulent leprosy or insanity ⁴². Neither pollution nor degradation of the adopter, nor the want of consent or pregnancy of his wife operated as a bar to his making a valid adoption.

(34) *Ayiswaryadevi v. Sreeni*, 49 M. 116.

(35) *Vellayappa Chetty v. Natarajan*, 55 M. 1 (P.C.).

(36) *Ramaling v. Peradai*, 25 M. 519.

(37) *Kamulammal v. Viswanathaswami*, 46 M. 167 (P.C.).

(38) *Jagendra v. Nityanand*, 18 C. 151 (P.C.).

(39) *Zipru v. Buntia*, 46 B. 424.

(40) *Dattatraya v. Motha Bala*, 58 B. 119.

(41) *Amraendra v. Sanatan*, 12 Pat. 642.

(42) *Nagamma v. Sankarappa*, 54 M. 576, contra in *Rhamappa v. Ujjangoda*, 46 B. 455.

Adoption by woman.—Except where the Kṛtrima form of adoption was allowed and in the case of Dancing Girls, a woman could not make an adoption to herself. But a wife can make an adoption to her husband with his consent. If the woman happened to be a widow, (1) she cannot in Mithila adopt even with her husband's consent, (2) in Bengal and Benares she can adopt only if her husband had assented, (3) in Western India she can adopt even without her husband's consent provided he had not prohibited it, and (4) in Southern India she can make an adoption either with her husband's consent or with the assent of his sapindas. In none of the Provinces can a widow adopt if her husband had prohibited it either expressly or by necessary implication⁴³ or if she had not attained years of discretion.⁴⁴

Authority to the widow to adopt.—The husband's authority empowering the wife to make an adoption to him need not be given in any particular form and may be oral or written, but it must have been given at a time when the husband has attained years of discretion and was not mentally disqualified. The authority may be to make any number of successive adoptions, provided each time an adoption was made, the previously adopted son was dead, and may be either absolute or conditional. It must be strictly construed⁴⁵ and if strict compliance with its terms is either impossible or will render the adoption invalid, the authority cannot be acted on. Thus an authority to two widows to make two simultaneous adoptions which would be invalid in law⁴⁶ or an authority to adopt with the consent of the husband's father who was dead at the time the adoption was sought is made ineffective to validate an adoption⁴⁷. But the authority must be construed so as to advance the purpose the husband had in view in giving the authority so that any authority for adopting a particular boy should not be construed as a prohibition against the adoption of any other boy unless such prohibition is expressly made and clearly intended by the husband⁴⁸. But a widow cannot be compelled to act upon the authority unless she chooses to do so⁴⁹ and when she does so choose, the fact that a long time had elapsed since the authority was conferred is by itself no ground for invalidating the adoption⁵⁰. But this absolute discretion of the widow in the matter of acting or not upon the authority is personal to her and cannot be delegated to another⁵¹. Nor can an authority be given to the widow to be exercised in conjunction with another person.⁵² But an authority which merely directs the widow to adopt after consulting or with the consent of another person cannot be said to be invalid⁵³.

Authority in the case of co-widows—Where a man had two or more wives he can authorise one or all of them to adopt to him. When the power is given to only one of them.

- (43) *Collector of Madras v. Mootoo Ramahanga*, 12 M.I.A. 397.
- (44) *Sathrajit v. Venkataswami*, 40 M. 925.
- (45) *Sitabai v. Babu*, 47 C. 1012 (P.C.).
- (46) *Surendra Keshav v. Doorgasundari Dassai*, 19 C. 513 (P.C.).
- (47) *Rajendra v. Gopal*, 10 Pat. 187.
- (48) *Yadav v. Namdeo*, 49 C. 1 (P.C.), *Venraperumal v. Nargan Pillai*, 1 N.C. 91; *Muraddhal v. Kundan Lal*, 28 A. 377 (P.C.).
- (49) *Mustaddal Lal v. Kundan Lal*, *supra*.
- (50) *Pratap Singh v. Agarwal*, 43 B. 778 (P.C.).
- (51) *Bamandas v. Tarun*, 7 M.I.A. 169.
- (52) *Amrit Lal v. Suramoyee*, 27 C. 996 (P.C.).
- (53) *Rajendra v. Gopal*, *supra*; *Bal Gangadhar Tyak v. Srinivas*, 39 B. 441.

she alone can adopt, but if it is severally given to all the widows, then the senior most of them gets the preferential right to make the adoption unless she dies or refuses to adopt or leads an immoral life which disqualifies her from making an adoption.⁵⁴ When a joint power is given to two or more widows, they should all act conjointly in the matter of adoption,⁵⁵ and if one of them died, the others cannot act

Adoption by widow in the Bombay Presidency—Under the Bombay school of Hindu Law, a widow had in herself power to adopt to her husband subject only to such restrictions if any as may have been imposed upon her by her husband. Thus so long as her husband had not prohibited an adoption she may adopt in her own independent right and without the consent of his kinsmen, whether the husband died a joint or a separated member of a Hindu family.⁵⁶ Even an adoption made by a widow succeeding to the last male holder's estate, not as his widow, but as his *Gotraja Sapinda*, was valid.⁵⁷

Adoption with the consent of sapindas—In Southern India the want of the husband's consent for the widow making the adoption can be supplied by the consent of the nearest sapindas.⁵⁸ If the father of the husband was alive, then his consent alone would be sufficient to validate an adoption. But if he be dead, there should be such evidence of the assent of her husband's nearest kinsmen as sufficed to show that the adoption was made by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive.⁵⁹ In the case of more than one nearest heir left by her husband, she must get the consent of all or a substantial majority of them for making a valid adoption.⁶⁰ It was the duty of the widow to ask for the consent of every one of the nearest sapindas even when she knew that the consent of some of them will be refused,⁶¹ but it is not necessary that she should consult a sapinda who had separated from her husband's family when there were undivided sapindas or who by reason of minority or lunacy or absence in a foreign country cannot give her his consent.⁶² Besides, where a near relative in refusing to give his consent was actuated by corrupt motives his dissent may be disregarded.⁶³ But a consent procured by fraud or corruption is invalid.⁶⁴ Besides, the mere circumstance that the consent of a substantial majority of the nearest sapindas has been obtained will not validate an adoption if the widow had omitted to consult any one of the nearest sapindas,⁶⁵ even if he be inimically disposed towards her and would have refused his consent if asked.⁶⁶ The absence of consent of the nearest sapinda cannot be made good by authorisation from distant relatives more remotely connected.⁶⁷ When there are no sapindas, the widow has in herself no residuary power to adopt,⁶⁸ but in the presence

(54) *Rukhmabai v. Radhabai*, 5 B.H.C.R. 181, *Ranjay v. Bijay*, 39 C. 582

(55) *Tiruvengala v. Dutkayya*, 52 M. 373

(56) *Narasimha v. Parthasarathy*, 37 M. 199

(57) *Bhimabai v. Gurusath Gonde*, 57 B. 157 (P.C.).

(58) *Radhabai Lamedar v. Rajaram*, I.L.R. (1938) B. 679.

(59) *Collector of Madurai v. Moottoo Ramalinga*, 12 M.I.A. 397.

(60) *Krishnayya v. Lakshmapathi*, 43 M. 650 (P.C.).

(61) *Veerasawaraya v. Balaswamy Prasad Rao*, 41 M. 998 (P.C.).

(62) *Verakamma v. Subramanian*, 30 M. 50 (P.C.).

(63) *Subbamma v. Adimoorthappa*, 21 L.W. 65

(64) *Balasubramania v. Subbaya*, 1938 P.C. 34

sapindas, near or remote, a daughter's or daughters' son's consent to the adoption is unnecessary.⁶⁵ An adoption made with the consent of the deceased son of the adopting widow is a valid adoption when there is no change in the circumstances and there are no grounds for the next presumptive reversioner to object to the adoption when actually made.⁶⁶

When there are two widows an adoption made by the senior widow with the sapindas' consent is quite valid even though the junior widow has not assented⁶⁷ but the junior widow cannot make such an adoption without the consent of the senior widow.⁶⁸

Husband's authority and sapindas' consent.—Husband's authority is intended to be exercised only after the death of the husband, there is no obligation upon the widow to make the adoption at once or within a reasonable time.⁶⁹ Sapindas' consent is intended to be used within a reasonable time after it is given and cannot be pocketed by the widow to be utilised long after it is given, when entirely different considerations as to the expediency of the adoption may apply.⁷⁰ Unlike in the case of the husband's authority, the consent of the sapindas to the adoption of any boy at any time will be invalid.⁷¹

Determination of the widow's authority to adopt.—A widow's power to adopt comes to an end where her husband dies leaving a son, natural or adopted, and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by an adoption.⁷² The same principle will apply to invalidate an adoption made in Southern India by a widow with sapindas' consent after her son's death leaving his own widow.⁷³ But if the son who had succeeded his father died leaving no heir other than his mother, then an adoption by her is not invalid.⁷⁴ So also an adoption by a widow inheriting immediately to her grandson who had succeeded directly to his grandfather would be valid.⁷⁵ In the case of a Hindu dying leaving a son and a widow with power to adopt, the duty of providing for the continuance of the line for spiritual purposes which was upon the father is laid conditionally upon the mother, and if this duty is assumed by the son and passed on by him to his own son or widow, the power is gone. But if the son died himself sonless and unmarried, the duty will still be upon the mother and the power in her which was necessarily suspended during the son's lifetime revives. A widow's power to make the adoption must be held to be dead or alive by applying this principle and not by applying the principle of divestment of the estate vested in another. The vesting of the property on the death of the last holder in some one other than the adopting widow, be he another coparcener of the joint family, or an outsider claiming by reversion or by intestate succession, cannot be in itself the test of the continuance

(65) *Madhavi v. Sanyal*, 57 M. 411, *Seshu ma v. Venkata*, 1 L.R. (1940) M. 454.

(66) *Annapurna v. Appayya*, 52 M. 624.

(67) *Nayanaswami v. Mangammal*, 28 M. 315.

(68) *Adithyan v. Pulamall*, 45 M. 266.

(69) *Raoji Shri v. Beni Bahadur*, 1 Luck. 403 (P.C.).

(70) *Amma v. Sanyasayana*, 49 M. 636.

(71) *Brahmayya v. Kattappa*, 20 L.W. 503.

(72) *Amarindra v. Sankar*, 12 Pat. 642 33 L.W. 1 (P.C.); *Bhoban Moyee v. Ram Kishore*, 10 M.I.A. 279.

(73) *Thayammal v. Venkateswami*, 10 M. 20 (P.C.).

(74) *Pellanki v. Venkaya*, 4 I.A. 1. 1 M. 174.

(75) *Narhar v. Balwant*, 48 B. 559.

or extinction of the widow's power of adoption.⁷⁶ Nor is a mother's authority extinguished by the mere fact that her son succeeding to her husband had died after attaining the age of discretion or ceremonial competence⁷⁶ or had died a widower leaving only a daughter.⁷⁷ In no case can a widow adopt to her deceased husband after her re-marriage to another.⁷⁸

Who can give in adoption.—A boy can be given in adoption only by his natural parents, and as between them, the father's discretion is absolute and he can give away the boy even against his wife's will. Even the mother cannot give the boy in adoption except when her husband is dead or is a lunatic or is permanently absent and has not prohibited the giving of the boy. But the mere conversion of the parents to another religion, does not deprive them of this power, though in such cases the necessary religious ceremonies have got to be done by a Hindu delegate. But the right to give in adoption cannot be delegated to another; nor can it be exercised by the widowed mother after she has married another.⁷⁹

Who can be adopted.—Except in the case of Dancing Girls an adoption can only be of a boy and not a girl. The boy to be adopted must belong to the same caste as the adopter (though they may be of different sub-castes) and should not be the son of a woman whom the adoptive father could not have married in her maiden state. Hence the adoption of the daughter's son, sister's son or mother's sister's son is invalid,⁸⁰ except when sanctioned by custom. Besides, a boy who is an orphan cannot be adopted except where it is approved by custom. But the adoption of an only son⁸¹ or of the eldest son or a remote relation or outside the gotra is not invalid. Since the boy to be adopted must have the capacity to make religious offerings, an adoption of a boy who cannot offer them by reason of lunacy, leprosy or illegitimacy cannot be valid. As regards the age of the boy, except in the Bombay Presidency, the limit of time after which a boy cannot be adopted is his Upanayanam amongst the twice-born or regenerate castes and his marriage among the Sudras. Even the performance of the Upanayanam does not operate as a bar to an adoption where the adopter and the adoptee belong to the same gotra.⁸² In the Bombay Presidency, however, there can be a valid adoption in any community of a married man, even older than the adopter and with children, though on adoption the sons born to the adoptee before adoption remain in the original family.⁸³

Ceremonies of adoption.—The physical act of giving and taking the boy which is the operative and the most essential part of the ceremony is absolutely necessary for a valid adoption and cannot be dispensed with even in the case of Sudras. Whether the ceremony of *Datta Homam* is necessary or not, the decisions are not uniform, but it may be taken that the Bombay, Calcutta and Madras decisions take the view that it would be necessary in the three regenerate castes, while the Allahabad decisions hold that it is not necessary. But if

(76) *Amarendra v. Sanatan*, 12 Pat. 642 38 L.W. 1 (F.C.), *Bhoobau Mogus v. Ram Kishore*, 10 M.L.A. 479.

(77) *Chambasappa v. Madhusalpa*, 1937 B. 337.

(78) *Fakrasappa v. Samstretia*, 1921 B. 1 (F.B.).

(79) *Punchappa v. Sangombasaram*, 24 B. 19. See contra in *Putlabai v. Mahadev*, 33 B. 107.

(80) *Bhagwan Singh v. Bhagwan Singh*, 21 A. 412 (F.C.).

(81) *Sri Balusu v. Sri Balusu*, 22 M. 398 (F.C.).

(82) *Balgangadhar Tilak v. Shrinivas Pundit*, 39 B. 441 (F.C.).

(83) *Balabai v. Mahadev*, 48 B. 387.

the adopter and the adoptee belong to the same gotra, the *Datta Homam* is only a matter of unessential ceremonial, as the same would be necessary, if at all, only when the adoption effects a change in the boy's gotra.⁸⁴ The Madras High Court has held that in the case of an adoption of a daughter's son which is valid under the custom of the Province, *Datta Homam* is not necessary.⁸⁵ Nor is it necessary in the case of Sudras.⁸⁶ Even where *Datta Homam* is necessary it can be performed after the physical act of giving and taking and even by delegating some other person to perform it.⁸⁷

Effect of adoption.—The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect of his paternal and maternal lines, and his complete substitution into the adopter's family as if he were born in it. But the adoption does not obliterate the tie of blood, and the disabilities against adoption and marriage in the boy's natural family still continue in spite of the adoption, and in cases where adoption of married persons is allowed, sons born to the adopted person prior to adoption still continue in the natural family. Besides, the adopted boy takes a lesser interest in the property of his adopter's family as against his after-born *aurasa* son.

Rights and liabilities in the natural family.—On adoption, the boy adopted loses all his future rights of inheritance in his natural family and *vice versa* his relations in that family can no longer be his heirs. But properties which have already become vested in him before adoption as an absolute owner either as the sole surviving coparcener or by inheritance or partition in his natural family are not forfeited by the adoption. In respect of such properties which he carries into his adoptive family he would be liable for all those obligations incidental to the possession thereof, such as the maintenance of dependent members, discharge of binding debts, etc.

Rights in the adoptive family.—An adopted son occupies the same position, except in respect of a few matters, as the *aurasa* son, and can never claim higher rights than the latter. Thus he cannot prevent his adoptive father from disposing of his self-acquired property in any way he likes. Like an *aurasa* son, he is entitled to succeed both lineally and collaterally and *ex parte materna* as well as *ex parte paterna* in his new family. But as against an after-born *aurasa* son, he occupies an inferior position and gets $\frac{1}{2}$ of the *aurasa* son's share in Madras and Bombay, $\frac{1}{3}$ of it in Benares and $\frac{1}{4}$ of it in Bengal. This rule, however, applies only in the case of the division of the ancestral estate, and not in the case of collateral succession wherein the adopted and the *aurasa* sons succeed to equal shares. Besides, among Sudras in Madras and Bengal, the adopted son shares equally with the after-born *aurasa* son.⁸⁸ In the case of succession to an impartible estate, the *aurasa* son takes precedence and excludes the adopted son.⁸⁹

Adoption and divesting of estate.—On a valid adoption of a boy by a widow, the property either vesting in her, or in her and her co-widows as the husband's heirs or vesting in

(84) *Balgangadhar Tilak v. Shrinivas Pandit*, (1915) 42 I.A. 135.

(85) 49 L.W. 53 (Short-notes).

(86) *Shoshinath v. Krishnasundari*, 6 C. 381 (P.C.).

(87) *Seetharamaiah v. Suryanarayana* 49 M. 969.

(88) *Pervaze v. Subbarayudu*, 44 M. 656 (P.C.).

(89) *Sahaygouda v. Siddingouda*, 1939 B. 166.

her as the heir of her son, at once becomes divested from her and becomes vested in the adopted son. This question of divestment will never arise when the adopter is the husband or the widow of a deceased coparcener. Even when the property has not vested in the adopting widow, if by virtue of the adoption, the adoptee becomes a nearer relation to the last male-holder than the person in whom the property has vested, then the adopted son is entitled to divest that person of that property.⁹⁰ But the Stridhana property of the adopting widow does not become divested by the adoption. In the case of a coparcenary, the adopted son steps into the joint family with all the interest and rights held by his adoptive father. After the Hindu Women's Rights to Property Act of 1937, adoption divests only half the estate of the adopted widow's husband, since under that Act the widow is herself entitled to share as a son.

Widow's alienation and adoption.—If the widow has made any alienation or created any encumbrance in respect of her husband's estate in excess of the powers as a qualified owner, the adopted son is entitled to set aside the same and recover possession from the alienor immediately after the adoption and without waiting till the death of the adopting widow.

Doctrine of relation back.—An adopted son's right to set aside an invalid alienation made by the widow relates back to the death of her husband so that all unauthorised alienations effected by the widow after her husband's death can be set aside by him. But his rights in other respects do not relate back to the adoptive father's death. Thus, for instance, where a man empowers his wife under a will to make an adoption and under the same instrument makes certain dispositions of property or where a man gives away his property to his daughters knowing that the widow of his predeceased son has been authorised by him to make an adoption, the son subsequently adopted either by the widow in the former case or by the daughter-in-law in the latter case cannot question the dispositions.

Results of an invalid adoption.—Where the adoption is for any reason invalid, the adopted son does not acquire any right in the new family, nor does he forfeit any of his rights in his natural family.⁹¹

Ante-adoption agreements.—Ante-adoption agreements entered into between the natural father of the boy and the adoptive father or mother having the effect of curtailing the rights of the adopted boy, though not absolutely void so as not to be capable of ratification by the boy on coming of age, are yet of no validity except in so far as such agreements are sanctioned by custom and regulate the right of the widow for her lifetime against the adopted boy. Where, however, such arrangements though assented to by the natural father, go beyond this and give the widow property absolutely or give the property to strangers, or authorise improper alienations of the property in which the adopted boy by his adoption acquires a right, they are not binding on the adopted son, and he being a minor, the principle of approbation and reprobation has no application in his case.⁹² But if the adopted son is of full age and deliberately agrees to an arrangement under which he is to receive no more than half the property of his adoptive father the agreement is not invalid and is binding on him.⁹³

(90) *Amarendra v. Sonatani*, 12 P. 642 (P.C.); *Vijaynagji v. Shrivangji*, 59 B 360 (P.C.). But see *Balu Saktharam v. Lahoo Sambhaji*, 39 Bom.L.R. 382.

(91) *Vismasundara v. Somasundara*, 48 M. 876.

(92) *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*, 50 M. 508 (P.C.).

(93) *Dal Bahadur v. Bijai Bahadur*, 52 A. 1 (P.C.).

Proof of adoption.—An adoption requires to be proved in the same way as any other fact, being, however, a heavy onus on the person setting it up to prove it. But circumstances may exist in any particular case to strengthen or weaken the probability of an adoption. For instance, if the alleged adoptive father was young, and could reasonably have hoped of begetting issue on his wife, the adoption would be rendered very unlikely. If, on the other hand, the said father was old and decrepit and was inimically disposed towards those who would succeed to him if he died childless, this would be a circumstance that could be urged in favour of the adoption having taken place. If it is proved that an adoption is apparently valid as performed, the onus is upon the person attacking its validity to establish how it was defective.

Estoppel and acquiescence.—Where a person makes an adoption and treats the adoptee as his or her adopted son, he would be estopped from questioning the validity of the adoption, but the others who are not the representatives of the person adopting will not be so estopped from questioning its validity. Mere acquiescence by those whose interest it is to deny or impeach the adoption will not preclude them from subsequently challenging the factum or the validity of the adoption, provided they are not barred by the statute of Limitation.

Kinds of adoptions other than the dattaka

Dvyamushyayana. Dvyamushyayana is the name given to a person who is given in adoption under an agreement that he should be considered to be the son of both the adoptive father and the natural father. Such a person inherits in both the natural and adoptive families,⁹⁴ and on his death his relations in both the families can inherit to him. But the children of the dvyamushyayana continue as members of the natural family. Where subsequent to a dvyamushyayana adoption, a son is born to the adopter, the share of the dvyamushyayana is 1/2 of what a Dattaka son would take as against an *aurasa* son. If however, a son is subsequently born to the natural father of the dvyamushyayana the latter takes half the share of the former.

Illatom adoption. Illatom adoption is a customary adoption of a son-in-law by his father-in-law prevalent among the Reddies and Kammaas in the State of Andhra Pradesh. This has no religious significance, being brought about in consideration of the adoptee's future services in the management of the adoptor's property. This kind of affiliation is not prevented by the existence of an *aurasa* or dattaka son, nor does it prevent the adopter from making a subsequent dattaka adoption. Though he counts as a son on a partition in his father-in-law's family, he is not a coparcener with his father-in-law or his sons, nor does he lose his rights in his natural family; nor do his children become members of the adoptive family.

Krtrimā adoption: This kind of adoption is also purely secular in nature as the illatom and the adoptee's rights in the natural family remain unaffected. Krtrimā adoption can be made by either man or woman and when a woman makes this adoption, the adoptee does not become the son of the adopter's husband. Any person may be adopted, though he be the father or brother of the adopter, and no ceremonies are necessary, the only requisite being the consent of the adoptee if a major or his parent's consent if a minor. By this kind of adoption the adoptee becomes the son of the adopter, but he is not entitled to claim any right of succession to any person other than the adopter in the new family.

(94) *Wooma Das v. Gokulchand*, 3 C. 537.

THE MITAKSHARA JOINT FAMILY

Constitution of a Hindu joint family.—A joint Hindu family consists of male members descended lineally from a common male ancestor together with their mothers, wives and unmarried daughters. Mitakshara coparcenary is a narrower body than the joint family and consists of only those persons who have taken by birth an interest in the property of the holder for the time being. The coparcenary commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. Thus, while a son, grandson or a great-grandson of the holder of ancestral property is a coparcener, his great-great-grandson is not a coparcener with him, because he is removed by more than three degrees from the holder. Only males can be coparceners. Though a common ancestor is necessary for the commencement of a coparcenary, it may continue without him consisting of collaterals and their descendants some of them being removed by more than three degrees from the deceased common ancestor. Coparcenary is a creature of law and cannot be created by act of parties save in so far that by adoption a stranger may be affiliated as a member thereof. A coparcenary may exist within another bigger coparcenary. Thus if a coparcenary consists of brothers and their sons one brother and his sons may hold the property separately acquired by them with the incident of survivorship without any rights therein to the other brothers and their sons.

Incidents of a Mitakshara coparcenary.—While the family remains undivided, no individual coparcener can predicate of the joint property that he has a certain definite share either in the corpus or in the income thereof. There is a community of interest and unity of possession between all the members and on the death of any of them the others take his interest also by survivorship. Till a partition takes place, a coparcener's interest remains fluctuating, enlarged by deaths and diminished by births within the coparcenary limits. Every coparcener, whether son, grandson or great-grandson, obtains an interest by birth in the coparcenary property so as to be able to control and restrain improper dealings with the joint property by another coparcener. He is entitled to reside and be maintained in the family house along with his wife and children and enjoys certain powers of alienation with a right to enforce partition of his share in the joint property.

Difference between Mitakshara coparcenary and joint tenancy.—A Mitakshara coparcenary and what is known as joint tenancy resemble each other in that (i) there is a right of survivorship in both, (ii) in both each member is entitled to joint possession over the whole of the joint property, and (iii) the act of one member enures to the benefit of others in both cases. But there are equally striking differences between them. (1) A Mitakshara coparcenary is a creature of law and comes into existence by birth or descent, while a joint tenancy is created by a deed or will and not by descent from another, (2) a Mitakshara coparcenary consists only of relations, while a joint tenancy may consist of strangers, (3) a coparcener's power of alienation of his share is restricted while that of a joint tenant is absolute though he too cannot transfer it by will, (4) a coparcener's interest is fluctuating by births and deaths in the family while the interest of a joint tenant is fixed; and (5) on the death of the last surviving coparcener, the whole property passes only to his heirs, while on the death of the last surviving joint tenant, the property descends in equal shares to the heirs of all the joint tenants.

Kinds of property owned by coparceners.—Property owned by a coparcener may be separate property or coparcenary property. Separate property of a coparcener is held by him free of all claims from the rest of his coparceners and comprises:—(1) property inherited

by him from persons other than the three immediate paternal ancestors, namely, father, father's father and father's father's father, (2) nuptial gifts out of the joint family fund and marriage gifts and other friendly offerings made by others; (3) property acquired by him unaided by the joint family estate together with the income and purchases from the income of such acquisition; (4) gains of science, (5) property obtained on partition with his other coparceners; and (6) property held by him as the sole surviving coparcener. Coparcenary property means and includes—(1) property obtained by gift or succession from any of the three immediate paternal ancestors (known as ancestral property), (2) acquisitions made by the coparceners with the help of ancestral property; (3) joint acquisitions of the coparceners even without such help provided there was no proof of intention not to treat it as joint family property; and (4) separate property of coparceners thrown into the common stock. Property, inherited by the sons of a daughter from their maternal grandfather is not coparcenary property."⁹⁵

Gains of science.—The texts of Hindu Law which lay down the divisibility among the co-heirs of the gains of science which has been imparted at the family expense contemplate the science which is the immediate source of the gains of the coparcener and not any elementary education, which is the necessary stepping stone to the acquisition of all science. Thus earnings of a coparcener due to special education given him at the cost of joint family will become joint family property.⁹⁶ But gains made by a coparcener who has received only an ordinary education at the family expense suitable to his position as a member of the joint family or gains of a coparcener which are the result not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education can never become the property of the joint family.⁹⁷ The whole question has now been set at rest by the Hindu Gains of Learning Act (XXX of 1930) which by Section 3, which, however is not retrospective, declares that "Notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of (a) learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family or with the aid of the funds of any member thereof or (b) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of the family, or by the funds of any member thereof.

Obstructed and unobstructed heritage—Heritage is of two sorts: unobstructed (Aparatibandha) or obstructed (Sapatibandha). Where ownership accrues to a person by virtue of his relationship to another who has been holding the property and even during the lifetime of the latter, the heritage is known as unobstructed: such is the ancestral property in the hands of the father, father's father or father's father's father. But where the life of the owner is an impediment to the accrual of the right to the successor it is known as obstructed heritage, for example, property devolving upon brothers, parents, uncles, etc.

Joint family property and joint ancestral family property.—The essential difference between joint family property and joint ancestral family property is that the latter

(95) *Muhammad Hussain v. Babu Kishore Nandan*, 1 L.R. (1937) A 655

(96) *Gokal Chand v. Hukam Chand*, 46 I.A. 162 2 Lah. 40.

(97) *Metharam v. Ramchand*, 45 I.A. 41; 45 C. 666.

necessarily connotes descent and predicates a nucleus while the former does not. Though the incidents of both the properties are the same, the former can be properly acquired by the present members of the joint family by their joint labour, while the latter must necessarily have been obtained by descent.

Ancestral property.—The term 'ancestral property' is a technical one meaning only property inherited from father, father's father or father's father's father. In that property, the inheritor's son, son's son and son's son's son get an interest by birth and can interdict improper alienations. Property inherited from the maternal grandfather by his daughter's sons is not taken by them as ancestral property with the incident of right by birth accruing to their own sons.⁹⁸ There is a difference of opinion among the High Courts whether property received from the father by gift or will is ancestral in the son's hands so as to enable the latter's sons to claim an interest in it as ancestral property. But if ancestral property is allotted to a coparcener's share in a partition, that coparcener's sons, whether born before or after partition, can claim an interest in it as ancestral property.

Presumption as regards joint family and separate property—The joint family is the normal condition of Hindu society and every such family is ordinarily joint not only in estate, but in food and worship. But there is no presumption that because a family is joint, it possesses any joint property. The presumption that property in the possession of an individual coparcener is joint family property arises only if it is shown that there was a nucleus of joint family property from which it might be fairly said to have grown, and where such nucleus is admitted or proved, the onus of proving separate acquisition is upon the coparcener alleging it. If the property is admitted to have been originally self-acquired but it is alleged that it was afterwards thrown into the common stock, the onus of proving such mingling is upon the persons asserting it, and this onus is not discharged unless a clear intention to waive separate rights is established.

Manager and his powers—Only a coparcener can be manager. A woman cannot, therefore, be manager. The senior-most male member of the family is entitled to manage the family properties on behalf of all the members except when he is incapacitated by age, illness or other sufficient cause. The managership of the joint family property comes to a person by birth and is not the result of the consent of the coparceners. Though he is likened to a trustee or agent of the joint family, he is not under the same obligation to economise or to save as an agent or trustee. He is entitled to the possession and management of the property, can contract binding debts for the family necessity or benefit, alienate the family property for such purposes and, in his capacity as representative of the family, give receipts, compromise or discharge claims, make a reference to arbitration, acknowledge debts and do all acts necessary and incidental to the proper management of the family estate. But he cannot revive a time-barred debt nor can he start a new business so as to bind the other members without their consent. He can sue and be sued on behalf of the family. In the absence of proof of direct misappropriation or fraudulent and improper conversion of the joint family money to his own personal use, he is liable to account at the time of partition between him and the other members, only for what he actually received and not for what he ought to or might have received if the estate had been more profitably managed.⁹⁹

(98) *Muhammad Hussain v. Babu Kishore Nandan*, 1 L.R. (1937) A. 655.

(99) *Perrazu v. Subbarayudu*, 44 M. 636 (P.C.).

DEBTS AND ALIENATIONS

Sources of liability to pay debts—A debt which a person may be under a liability to discharge may be a debt contracted by himself or by another. The liability to pay the debts contracted by another may arise out of (1) a legal duty as when the debt is contracted by an agent, (2) a moral duty as when a person has succeeded to the property of the person who contracted the debt or (3) a religious duty as in the case of a Hindu son to pay the debts of his father and thus save him from sin.

Coparcener's debts—Every coparcener is bound to pay his debts out of his separate property. Besides, his undivided interest in the joint family property is liable to be proceeded against by his simple creditor if he has attached that interest in execution of a decree during the coparcener's lifetime.

Alienation by coparcener.—In the Provinces of Madras, Bombay, Berar and the Central Provinces, one of several coparceners may, without the assent of the others, sell, mortgage or otherwise alienate his share for valuable consideration. But under the Mitakshara as administered in Bengal, United Provinces, the Punjab and Berar and Orissa, a coparcener cannot, without the consent of his other coparceners, mortgage or sell his undivided share on his own account. In none of the Provinces can a Mitakshara coparcener dispose of his undivided interest by gift.

Manager's power to incur debts and alienate joint family property—A manager of a joint family, in addition to his powers as an ordinary coparcener, enjoys certain privileges by virtue of his position as the manager of the joint family. He can contract debts so as to be binding upon the undivided interest of all the other coparceners either for family necessity or for family benefit. He may alienate the whole joint family interests including those of the other coparceners for such family benefit or necessity. An alienation by the manager by way of mortgage or sale of joint family property will be good as against the other coparceners either when all of them had consented to the transaction, or the alienee is able to show that it was supported by legal necessity or benefit of the family or that he made *bona fide* and reasonable enquiries which showed him that such necessity existed even though no such necessity did in fact exist.¹⁰⁰ If the alienee does so enquire and acts honestly, the real existence of the alleged necessity is not a condition precedent to the validity of the alienation, and the alienee is not bound to see to the application of the consideration for purposes of any such necessity or benefit. If the transaction itself was justified by necessity, the mere fact that a part of the consideration is not substantiated by legal necessity would not necessarily nullify the alienation.¹⁰¹ Legal necessity justifying an alienation by the manager of the family property may be religious or secular, marriage and obsequial ceremonies in the family, the education and maintenance of the various members of the household, payment of binding debts and Government revenue, judicial proceedings for recovering the family estate or defending a member of the family in a prosecution, and a hundred other similar things may fall under the category of such legal necessities. But in all cases where the validity of an alienation by the manager is impeached by the other members of the family, the burden of establishing its validity on any of the grounds abovementioned is on the alienee.

(100) *Hannoman Pershad's case*, 6 M.L.A. 398.

(101) *Ram Sunder Lal v. Lachmi Narain*, 51 A. 430 (P.C.); *Krishan Das v. Nathu Ram*, 49 A. 149 (P.C.).

Father's debts and alienations and son's pious obligation—Every son, son's son or son's son's son is under a pious duty to discharge the debts with interest of the father, father's father or father's father's father, provided the debts are not tainted by illegality or immorality and the sons, etc., have joint family assets in their hands. The liability of the sons, etc., is not a personal liability but is one limited to their interest in the joint family property. This obligation exists both during and after the ancestor's lifetime, and if the debt was incurred at a time the father and the son were living together and not after, the liability of the son continues even after their separation. But the son alone cannot be sued during the father's lifetime. *Ayavaharika* is the term employed to denote a debt which is illegal or immoral. The mere circumstance that the debt is imprudent or unreasonable or improper or indicates a lapse from right conduct or is incurred in trade or speculation does not render a father's debt *ayavaharika*. In order to render a debt *ayavaharika* there must be an element either of immorality or illegality. Even in respect of father's alienations, the sons are under a distinct disadvantage, for a father enjoys certain powers of alienation in addition to those which he may have as an ordinary coparcener or manager of the family. Thus he can make within reasonable limits gifts of ancestral property either for pious purposes or through affection. Besides, a father can alienate joint family property by way of sale or mortgage, so as to be binding even upon his son's interest, to discharge his antecedent (previously incurred) debts which are neither illegal nor immoral, though such debts were incurred only for his own personal benefit and not for the benefit or necessity of the family. But such an antecedent debt for which the alienation is made, must be antecedent both in fact and in time to the alienation and should not be a part of the transaction impeached¹⁰² though the debt may be a simple debt or a mortgage debt. Where a question arises whether the father's debt or alienation is binding upon the sons, the onus of proving that the transaction was illegal or immoral is upon the sons. Mere proof of the general immoral life of the father without establishing a direct connection between his immorality and his debt does not discharge this onus,¹⁰³ in other words the evidence should be such that the Court could reasonably infer that the debt must have been incurred for an immoral purpose.

PARTITION

What is partition—Under the Mitakshara, partition does not mean simply division of property into specific shares. It covers both division of title and division of property. An unequivocal manifestation by a member of a joint family by his words or conduct of a fixed and determined intention to become separate from the other members is sufficient to effect the separation of his title and the severance of his interest, although division of possession, or partition by metes and bounds, does not take place and the members continue joint in food and dwelling.¹⁰⁴ For a severance in status (i) there must be an unmistakable manifestation of intention to become divided (ii) no division by metes and bounds is necessary (iii) existence of property is not essential, (iv) reasons for the severance are immaterial, (v) the existence of minors in the family is no bar, and the intention to separate must be communicated to the other members.

Partition how effected—Partition between the members of a joint family may be effected (i) by the father dividing the property equally amongst his sons during his lifetime

(102) *Brij Narain v. Mangala Prasad*, 46 A. 95 (P. C.)

(103) *Shyam Narain v. Suraj Narain*, 37 L.W. 277 (P.C.),

(104) *Gurga Bai v. Sadashiv*, 43 C. 1031 (P.C.)

(ii) by a coparcener unambiguously expressing his intention to become divided from the other coparceners, (iii) by the coparceners making a submission to arbitrators for effecting a division, (iv) by the institution of a suit for partition by a coparcener (if the suit is not subsequently withdrawn), (v) by agreement of partition between the coparceners, and (vi) by conversion of a coparcener to another religion. In the case of a minor coparcener, if a suit is instituted on his behalf for partition, if it ends in a decree, it has the effect of creating a division of status from the date of the plaint but a mere filing of the plaint does not by itself effect his severance from the joint family.

Agreement not to partition.—There is a conflict of decisions on the question whether an agreement not to partition is binding upon the parties thereto,¹⁰⁸ but that it is not binding upon their heirs and successors¹⁰⁹ seems to be clear.¹⁰⁷

Form of partition.—A partition need not be in writing, but if it is in writing it requires registration for proof of its terms, though when the writing is unregistered, it is admissible to prove the division in status.

Subject-matter of partition.—The property to be partitioned is only the coparcenary property and does not include either the separate property of the individual members or coparcenary property which by its nature is indivisible, such as family idol, right to well or way, or an impartible estate. In the case of the dwelling house and other properties, movable or immovable, which are not conveniently partitionable, the proper method is to assign them to the shares of particular members and give compensation to the others. In ascertaining the assets available for division a legate provision should be made for payment of debts binding on the family, for meeting the expenses of necessary religious ceremonies and maintenance of disqualified heirs, and for the marriage expenses of unmarried sisters.

Rules as to accounting.—All that a coparcener is entitled to ask at the time of partition from the manager is an account of the assets as they exist at the date of the severance in status. In the absence of fraud, dishonesty, misappropriation or gross reckless waste, the manager cannot be called upon to defend the propriety of his past transactions or the manner in which he has disposed of the income in the past.¹¹⁰ No coparcener is entitled to credit being allowed to him on the ground that the amount spent upon him and his branch was smaller than what had been spent upon another member's branch. But when a coparcener has been deliberately excluded from joint possession and enjoyment of the family property or where partition was improperly refused, he is entitled to claim mesne profits from those who excluded him.

Persons entitled to demand and share on partition.—Every coparcener is entitled to demand a partition and obtain a share therein provided he is not disqualified. In Bombay, however, an exception is recognised that a son is not entitled to demand a partition without his father's consent so long as the father is joint with his own ancestors or collateral relations. Besides coparceners, a mother, grandmother and great-grandmother, though they are not

(105) *Ramkanya v. Pirupulaha*, 7 B 536, *See contra Rep. Singh v. Bhupati*, 42 A. 39 and *Krishnakshi v. Debnath*, 12 C.W.N. 733.

(106) *Vaidyanathan v. Brannan*, 4 M.F.C. 345.

(107) *See Ramkanya v. Ranganathan*, 17 M. 405 and *Ajit Kumar v. Srimati Tarabala*, 63 G. 289.

(108) *Perrin v. Subbarayudu*, 44 M. 66 P.C.

entitled to demand partition, are still entitled to share on a partition except in Southern India where this practice of allotting shares to females is no longer in vogue. Now under the Hindu Women's Rights to Property Act of 1937, the widow of a deceased coparcener is also entitled to demand a partition of his share.

Division *per stirpes* and *per capita*.—Where a division takes place in a joint family consisting of sons, grandsons and great-grandsons, each branch takes *per stirpes* as regards the other branches, but the members of each branch take *per capita* as regards one another. If a joint family consists of a father *X*, his three sons *A*, *B* and *C* and *A*'s three sons *D*, *E* and *F*, and if a partition takes place as between all these members, *X* will take 1/4, *A*'s branch will take another 1/4, and *B* and *C* will each take 1/4 of the property. But in the 1/4 share allotted to *A*'s branch consisting of *A* and his sons *D*, *E* and *F*, each of these will take 1/4 of 1/4 1/16 as against the members of that branch.

Shares of sons, father and grandfather.—When a partition takes place between a son, his father and his grandfather, the grandfather is entitled to 1/2, the father 1/4 and the son 1/4 of the joint assets.

Adopted son.—In a partition between a father and his adopted son, each takes 1/2. But if there is also an after-born *aurasa* son, then the father will rank as an *aurasa* son for purposes of computation of shares and the adopted son will get 1/4, or 1/3 or 1/2 of the share of the father or the *aurasa* son according to the school to which he belongs as already mentioned when dealing with adoption.

Illegitimate son.—The illegitimate son of a Hindu belonging to any of the regenerate castes is not entitled to a share in the property. Even in the Sudra caste he is not entitled to demand a partition during his father's lifetime, or even after that if the father had died undivided from his collaterals leaving no separate property.¹⁰⁹ But if the father dies divided from his collaterals and leaving a legitimate and illegitimate son, the latter is entitled to get 1/2 of what he would get if he were legitimate. This would be so even if the father had died leaving a widow, daughter or daughter's son.

After-born son.—A son born after partition might have been conceived either before or after partition. If he was conceived after partition he is not entitled to reopen the partition if a share had been allotted to his father in a partition between the father and the other sons, though he will be entitled to reopen if no share had been assigned to the father. But if the son was conceived even before partition, he is entitled to get his share by reopening the partition if no provision has already been made for his share.

Minor coparceners.—A partition can be claimed on behalf of minors if the continuance of joint status is prejudicial to their interests. In a suit for partition on behalf of a minor, no decree for partition should be passed unless the Court finds that it will be for the minor's benefit. But minority of a coparcener is no impediment to a valid partition taking place in the family, though if such partition is prejudicial to his interests, he is entitled to set it aside so as to have those interests secured. If a suit for partition on behalf of a minor is instituted, the fact that he dies during its pendency does not make the suit abate, and the suit can be

continued by his legal representatives and a decree obtained therein if it is shown that the suit at the time of its institution was one for his benefit.

Disqualified coparceners.—Under the Hindu Law a person suffering from a disability which disentitles him to inherit cannot claim a share on partition. But this disability is purely personal to him and does not attach to his male descendants. Again, if the defect be removed subsequent to partition, he is entitled to reopen the partition and have a share allotted to him. But by the Hindu Inheritance Removal of Disabilities Act of 1928, which, however, is not retrospective, and does not apply to persons governed by the Dayabhaga School, it is only a person who has been a congenital lunatic or idiot that is disqualified from inheriting or claiming a share on partition. Such disqualified coparceners are, however, entitled to a provision for maintenance both for themselves and their wives and children.

Female sharers.—The wife, the mother, the grandmother and the great-grandmother, including step-mother or step-grandmother, are also entitled to share on partition. The wife or mother is entitled to receive a share equal to that of her son, and so also is a grandmother entitled to the share equal to that of her grandson if no son be alive at the time of the partition. In ascertaining the share any income-yielding property already given to the female sharer either by the husband or father-in-law must be taken into account. Now under the Hindu Women's Rights to Property Act of 1937, every coparcener's widow is entitled to demand and get a partition of her husband's share as against the surviving coparceners.

Purchasers from coparceners.—A person claiming under a valid sale of a coparcener's undivided interest is entitled to claim a partition of that share as against the other coparceners. His remedy is to have that share ascertained in a suit for general partition in which the whole joint family properties are included. In a suit of this nature, the Court in making the partition would endeavour to give effect to the alienation and allot the very property alienated to the purchaser, if the same can be done without injustice to others. The alienee's share on partition is to be determined with reference to the alienating coparcener's share on the date of the alienation, but that share has to be worked out only by taking the properties actually existing at the time of the partition.¹¹⁰

Partial partition.—Partition may be general or partial. A general partition is that which is brought about in respect of the entire joint family property by all the members getting themselves separated from one another. A partial partition is that which takes place either in respect of only a portion of the joint family property or in respect of only some of the joint owners.¹¹¹ A partition is presumed to be in respect of all the joint family properties, but there is no presumption that a partition is in respect of each member as against every other member of the coparcenary.¹¹²

Successive partitions.—Where only some of the members of a joint family separate, leaving the rest joint, the ordinary rule is that a subsequent partition should be made *res inter se stantibus*, as at the date of the partition, which according to the Madras High Court means

(110) *Muthukumara v. Sivanarayana*, 56 M. 531.

(111) *Ramalinga v. Narayana*, 1922 P.C. 20. 45 M. 489.

(112) *Balkrishna v. Ramkrishna*, 53 All. 300 (P.C.).

"as at the date of the original partition"¹¹³ while the Bombay High Court takes it to mean "as at the date of the subsequent partition"¹¹⁴ Thus where there are two or more branches of a joint family and one member of one branch separates leaving the rest joint, according to the Madras view, the share already taken by him should be deducted from the share due to his branch at a subsequent partition, while according to the Bombay view that share has to be entirely ignored and the subsequent partition is to be effected as if it is itself an entirely new and complete partition

Reopening partition.—Partition once made cannot ordinarily be reopened But if the allotment of shares has been vitiated by fraud or mistake, as when a property not belonging to the family has been allotted to a coparcener's share, or if it is prejudicial to a minor or absent coparcener, the partition can be reopened In addition, there is the right of an after-born son and disqualified coparceners to reopen a partition as already mentioned.

Effect of partition.—On a separation in status, the members hold the property as tenants-in-common and not as joint tenants Subsequent births and deaths in the family do not effect any fluctuation in the quantum of shares taken by the divided coparceners. The special privileges of the manager and the father can no longer be exercised by them in respect of those members of the family who have become separate from them.

Re-union—The members of a joint family who have separated may agree to re-unite so as to form a joint family The effect of re-union is to cancel the partition and remit the parties to their original status of jointness.¹¹⁵ Such re-unions being rare, there is a presumption, though rebuttable, against their having taken place. Mere jointness in residence, food and worship, does not necessarily connote re-union in the same way as a separation in these respects is not conclusive proof of partition. A re-union in estate properly so called can only take place between persons who were parties to the original partition, and that too only with the father, a brother or a paternal uncle¹¹⁶ Since a re-union involves an intention to become once again joint in estate and interest, no agreement to re-unite can be made by or on behalf of minors¹¹⁷ But fathers by their re-union can carry their undivided minor sons into the re-united family¹¹⁸

Partition and re-union—Presumptions.—A Mitakshara family is presumed in law to be a joint family until it is proved that its members have become separated But once a partition is proved to have taken place, the presumption is that it was a partition of all the joint family properties. Mere separation in food and worship does not show separation in status. For a legal division in status there must have been an unambiguous indication of intention to become divided in status. But actual division of property is not necessary for a severance in interest Where one coparcener is shown to have separated from the rest there is no presumption either that the latter have also become separated from one another or that

(113) *Narayana Sah v. Sankar Sah*, 53 M. 1.

(114) *Prayagdas v. Lacharam*, 99 B. 734

(115) *Palani Ammal v. Mathurapattichala*, 48 M. 254 (F.C.).

(116) *Ram Narayan v. Pan Kuer*, 14 Pat. 268 (F.C.).

(117) *Balabhai v. Rukhmabai*, 30 C. 725 (F.C.).

(118) *Babu v. Gaidhadu*, 55 M.L.J. 192: 1928 M. 1064.

they continue joint Where a coparcener who has sons separates from his brothers or ancestors, there is no presumption that he has separated also from own his sons. Law always presumes against re-union on the ground that it very rarely takes place, and hence a re-union requires to be strictly proved.

JOINT FAMILY AND PARTITION UNDER THE DAYABHAGA.

Dayabhaga family—Constitution of.—Under the Dayabhaga there can be no coparcenary between a father and his sons. The son does not get any interest by birth in the ancestral property in the hands of the father and hence cannot claim partition against him. The father is the absolute owner of the property with absolute powers of gift and sale unfettered by any right in the son to restrain his unauthorised alienations. Unlike under the Mitakshara where the coparcenary springs up *on the birth of a son*, the Dayabhaga coparcenary comes into existence only upon the *death* of the father. The Dayabhaga coparceners are in the position of tenants-in-common, and on the death of any one of them without leaving a son, his rights do not go to the other coparceners, but to his own heirs, such as his widow, daughter, mother, etc., who then become coparceners with the rest. Thus unlike the Mitakshara coparcenary, the Dayabhaga coparcenary, may consist of both males and females. Inasmuch as each coparcener takes a defined share in the Dayabhaga coparcenary, his power of alienation in respect of his share are absolute and unfettered and he can call for partition at any time he likes. Under the Hindu Women's Rights to Property Act, on the death of a Hindu intestate, his widow, the widow of his predeceased son and the widow of a predeceased son of his predeceased son succeed to his property together as co-heirs along with his sons or even in the absence of his sons and can themselves call for partition.

Partition under the Dayabhaga.—A partition in a Dayabhaga joint family can only mean a division of the common property by metes and bounds among the coparceners who may be either males or females as already mentioned. Besides, a mother or daughter of a male coparcener succeeding on his death to his share, is entitled to call for partition. On a partition between sons the mother is entitled to a share equal to that of a son. But neither a mother who has an only son, nor a sonless step-mother is entitled to share on partition. But under the Hindu Women's Rights to Property Act, this rule is abrogated and all the widows of a deceased Hindu are together entitled to a share which is equal to that of a son.

MINORITY AND GUARDIANSHIP

Age of majority.—Under the Majority Act of 1875, which applies also to Hindus, in the case of every minor of whose person or property a guardian has been appointed by any Court of justice and of every minor under the jurisdiction of any Court of Wards, minority terminates on the completion of the 21st year, and in all other cases on the completion of the 18th year. But in respect of matters of marriage, divorce and adoption, to which the Act does not apply, the age of competence is to be ascertained according to Hindu Law, which is the completion of 15 years according to the Bengal School and the completion of 16 years according to the other schools.

Kinds of guardians.—Guardians are of four kinds: (1) natural guardians; (2) testamentary guardians; (3) Court guardians; and (4) *de facto* guardians.

(1) *Natural guardian*.—A natural guardian is one who, by virtue of his or her relationship to a child, has a claim to be its guardian. Such a guardian under the Hindu Law is either the father or the mother, and nobody else is entitled as a matter of natural right to be a minor's guardian. As between the father and mother, as a vestige of *patria potestas*, the father's right to have the custody of the person and property of his legitimate children prevails over that of the mother, and his right is so paramount that neither his loss of caste or religion, nor his remarriage, will in itself be sufficient to dislodge it. He can appoint a guardian by his will even to the exclusion of the mother, though he cannot appoint a testamentary guardian in respect of the joint family property. But in the case of illegitimate children, the right of their mother to be their guardians prevails over that of their putative father.

In *Basant v. Narayana*⁽¹¹⁹⁾ it was held by the Privy Council that the father's guardianship is in the nature of a sacred trust, so as to preclude him during his lifetime to substitute another as the guardian in his stead, and that if the father, acting in his discretion, entrusts the custody and education of his children to another, the authority that he thus confers is a revocable authority; but if that authority has been acted on in such a way as to make its revocation undesirable in the children's interests, then the Court will interfere to prevent its revocation.

(2) *Testamentary guardian*.—No one can appoint a testamentary guardian in respect of a minor's person or property except his father, and even the mother of the minor cannot claim this right.

(3) *Court guardian*.—In making orders appointing guardians the most paramount consideration for a judge ought to be, what order under the circumstances of the case would be best for securing the welfare and happiness of the minors. No relation barring the parents is entitled as of right to be appointed the guardian of a minor. Even in the case of parents, there may be circumstances like the conversion of the minor or the conversion of the parents, which, taken with other circumstances, may make it necessary that the minor should be placed in the custody of some other person. Ordinarily the husband is entitled to be the guardian of his minor wife and the adoptive parent is to be preferred to a natural parent.

(4) *De facto guardian*.—A *de facto* guardian is one who is not a legal guardian in the sense that he is either a natural, testamentary or Court guardian, but who, being interested in the minor, takes charge of the management of the minor's property.

Powers of guardians.—A natural guardian can do all acts which are reasonably necessary for the protection of the minor's property. He can transfer any portion of the minor's property by mortgage or sale in case of necessity or for the benefit of the minor's estate.⁽¹²⁰⁾ But he can in no case bind a minor by any personal covenant, and no decree can be passed against the estate of the minor on such covenant except when there is a liability on the estate by reason of a benefit or necessity including an obligation under his personal law. He cannot revive a time-barred debt, nor is he authorised to embark the minor's property in speculative transactions in order to liquidate his debts. Even a *de facto* guardian has the same powers as the natural guardian, but in the case of a Court guardian or testamentary guardian, he is to act within the terms of the order of appointment and the provisions of the Guardians and

(119) 38 M. 807 (P.C.).

(120) *Hanuman Persad v. Musumayee Beebee*, 6 M.I.A. 393.

Wards Act, if he is a Court-guardian,--and the conditions of the will if he happens to be the testamentary guardian.

Remedies and Limitation.—Where a guardian is deprived of the custody of the minor he may apply under section 491 of the Criminal Procedure Code of 1898 or under section 25 of the Guardians and Wards Act for getting back such custody. If the guardian acts in excess of his powers and alienates the minor's property the minor can have the transfer set aside by instituting a suit within three years from the date of his attaining majority under Article 44, Limitation Act of 1908

MAINTENANCE

Persons entitled to claim maintenance—The persons who are entitled to claim maintenance fall under two classes, (1) those whose claim to maintenance arises by virtue solely of the relationship with, and irrespective of the possession of property by, the person against whom the claim is to be exercised and (2) those whose claim is dependent upon the possession of property by such person. Every Hindu irrespective of his possessing any property, is personally bound to maintain (1) his aged parents, (2) his wife, (3) his minor sons, whether legitimate or illegitimate and (4) his unmarried daughters, but he is under no such liability in respect of his grand-parents, his concubine or grandchildren. In addition to this personal liability, a Hindu is liable to maintain out of the property in his hands all those persons whom a deceased person from whom he has inherited that property was either under a legal or a moral duty to maintain. Thus a father-in-law is only under a moral and not a legal obligation to maintain his destitute and widowed daughter-in-law out of his self-acquired property, but if he dies and his property is inherited by his surviving sons, they would be under a legal obligation to maintain her out of that property.¹²¹ Besides, the manager of a joint family is bound to maintain out of the joint family assets all its members, both male and female, and the widows and children of deceased coparceners. In case a coparcener is excluded from inheritance by reason of a disability he is suffering from, the property which he would have inherited but for that disability is liable for the maintenance of both himself and his family.

Maintenance of wife—A wife is entitled to be maintained by her husband irrespective of his possessing any property, even when she lives away from the husband for a justifiable cause, as for instance, his cruelty or contagious disease, and after his death, any person who takes his interest, either by survivorship as his coparcener or by inheritance as his heir, is bound to maintain her, provided she remains unmarried and chaste, in the same degree of comfort and with the same reasonable luxury of life which she had in her husband's life-time.¹²² The widow of a coparcener does not forfeit her right to maintenance out of the joint family assets simply because she refuses to live with her husband's coparceners, unless she does so for improper or immoral purposes. Under the Hindu Women's Rights to Property Act of 1937, the widow of a coparcener is entitled to the share of the husband and hence cannot enforce her right to maintenance if the surviving coparceners insist on her walking out with her husband's share therein.

Maintenance of concubine.—A concubine has no right to be maintained by her paramour, however long might have been the concubinage, but after his death, she acquires

(121) *Rajani Kanta v. Sayani Sundari*, 61 C. 221 (P.C.); Since the Hindu Women's Rights to Property Act, 1937, she is also entitled to a share.

(122) *Khudabhai v. Hanubhai*, 8 P. 840; 56 I.A. 182.

a right to be maintained out of his estate provided (1) she had been exclusively kept by him till his death, and (2) had throughout remained faithful to him, though she did not reside in his family house ¹²³

Maintenance liable to variation.—The rate of maintenance is liable to be increased or decreased in accordance with the means of the family, whether it is fixed by agreement of parties or by the decree of Court ¹²⁴. But if the widow has been allotted a sufficient amount for her maintenance and in consequence she has relinquished her right to maintenance once and for all, she is precluded from claiming any further amounts even if she has dissipated the amount allotted to her

Right of residence and maintenance.—The widow or the unmarried daughter of a deceased coparcener has a right of residence in his family dwelling house and this right cannot be defeated by the surviving coparceners selling the house to another with notice of that right. Even if the house is transferred to one without notice of her right, the transferee cannot eject her without providing her with some other suitable place of residence. But neither the wife nor the daughter is entitled to have her right of residence in the family dwelling house maintained against one who has purchased it either under a private sale from the husband or father, or in execution of a decree against him or against his estate. Nor is she entitled to claim this right where the father or the manager of the family sells away the house for a purpose which is binding upon the husband or father. In the same way a transfer of property for a debt incurred by the husband or father or by the manager of his family for purposes binding upon the family prevails over her rights to maintenance, if her claim has not been already made a charge on the property ¹²⁵. But this right to maintenance cannot be defeated by a gift or devise of the entire property by the person liable to maintain.

GIFTS AND WILLS

Gifts and wills defined.—Gift is the transfer of certain existing property made voluntarily and without consideration, by one person called the donor to another called the donee and accepted by or on behalf of the donee. Will means the legal declaration of a testator's intention with respect to his property which he desires to be carried into effect after his death. A gift takes effect immediately, while a will takes effect only after the testator's death. A gift is irrevocable, while a will can be revoked at any time before the testator dies. A *donatio mortis causa* or a gift made in contemplation of death is also valid under Hindu Law.

Form of gift and will.—For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument, signed by or on behalf of the donor, and attested by at least two witnesses. A gift of movable property may be effected either by a registered instrument signed as aforesaid or by delivery. As regards wills, all Hindu wills and codicils executed before 1st January, 1927 may be oral or in writing and if in writing does not require registration or attestation. But all Hindu wills and codicils made after 1st September, 1870 in or relating to immovable property situate within the Province of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Madras

(123) *Bai Nagubai v Bai Monghubai*, 53 I A 153-50 Bom. 604

(124) *Gopikubai v Dattatraya*, 24 B 386

(125) See Section 39 of the Transfer of Property Act as regards transfers by other persons.

and Bombay, and all Hindu wills and codicils executed on or after 1st January, 1927 should be in writing and attested by at least two witnesses.

Capacity to make a gift or will.—Every person of sound mind and not a minor under the Indian Majority Act, can dispose of his absolute property by way of gift or will. Thus a coparcener under the Mitakshara cannot dispose of his undivided interest in the joint family property by gift or will, though he can do so in respect of his separate property or where he is the sole surviving coparcener. But a Mitakshara father can make a gift of immovable property to his daughter or for pious purposes within reasonable limits. So also can a widow who has inherited her husband's property.

Who can take under a gift or will.—A gift or bequest can be made to any person though he be a minor, or one incapable of inheriting by reason of some personal disqualification. Under the Hindu Law, gifts and bequests to persons unborn are absolutely void.¹²⁶ But by the passing of certain enactments, they are declared valid if they do not offend the rule of perpetuities laid down in Section 14 of the Transfer of Property Act and Section 114 of the Succession Act. Where a gift is made to two or more persons some of whom are capable of taking and the others not, those who are capable shall take the whole as tenants-in-common.

Persona designata.—The question whether a gift or bequest to a particular person described as satisfying a particular description, such as an adopted or on aurasa son, is valid or not when it is found that he does not satisfy the description is to be answered with reference to the intention of the donor or testator in making the gift to him. If the intention is that the donee should take only if he satisfies the description, the gift cannot take effect. But when the gift is made to a person absolutely as a *persona designata*, the addition of the description being merely a matter for identification, the donee takes the property even though he does not satisfy the description given.¹²⁷

Creation of estates unknown to Hindu Law.—All estates of inheritance created by gift or will, which are unknown or repugnant to Hindu Law, are void. Thus the creation of an order of succession which excludes the ordinary legal heirs is invalid and inoperative.¹²⁸

Construction of gift or will.—In all cases the primary duty of a Court is to ascertain from the language used by the donor what were his intentions. "The Court is entitled to put itself into the testator's arm-chair" and must take into consideration the surrounding circumstances and the racial and religious influences operating on the mind of the testator in making the disposition.¹²⁹ In the case of a will of a Hindu in favour of a female relation it is possible by the use of words of sufficient amplitude such as *malik*, etc., to convey to her in the terms of the gift the fullest rights of ownership including the power to alienate, and it is not necessary to pass an absolute estate to a woman that the power of alienation should have been expressly conferred upon her.¹³⁰ When an absolute estate has been conferred on the donee by a

(126) *Tagore v. Tagore*, 1 A. Suppl. Vol. 47.

(127) *Venkata Surya v. Courts of Words*, 22 M. 383 (P.C.).

(128) *Tagore v. Tagore* supra.

(129) *Mahomed Shumsool v. Shewukram*, 2 I.A. 7.

(130) *Ramachandra v. Ramachandra*, 42 M. 283; *Shah Ram v. Chauranghi*, 11 Loh. 645 (P.C.).

earlier clause in the instrument a subsequent clause having the effect of restricting that interest is to be rejected as repugnant and ignored¹³¹

Proof of will—The burden of proving a will is upon the person who propounds the will and such proof relates to two things, (i) that the will was executed by the person by whom it purports to have been executed, and (ii) that he had executed it with a sound disposing mind.

Revocation and alteration of wills—All Hindu wills required by law to be in writing and attested as already mentioned can be revoked or altered only in accordance with the provisions of sections 70 and 71 of the Succession Act of 1925; all other wills can be revoked either orally or by writing, the only requisite being some act showing an *animus revocandi*.¹³²

PRINCIPLES OF INHERITANCE

Foundation of the rules of inheritance.—The text of Manu "Sons take the property, to the next sapinda the inheritance next belongs" is the foundation of the rules of inheritance amongst the Hindus. Jimutavahana, the author of the Dayabhaga, considers sapinda relationship to mean "community in the offerings of funeral oblations," while Vijnaneswara, the author of the Mitakshara, takes it to mean "community of blood." The word "sapinda" is derived from two words, "Sah" meaning "with" and "pinda" meaning "ball or body", as interpreted by Jimutavahana as "connected by the funeral cake or ball" and by Vijnaneswara as "connected by the particles of the same body." Owing to this difference in the interpretation of the word, propinquity or community of blood is the test of preference under the Mitakshara, while spiritual benefit conferable upon the deceased is the guiding test in succession under the Dayabhaga.

Exclusion from inheritance—Disqualifications under Hindu Law which disable a person from inheriting to another may be (1) physical, (2) mental, (3) moral, (4) religious or (5) equitable. Congenital blindness, congenital deafness, congenital dumbness or want of any limb or organ which is congenital, or deformity and unfitness for social intercourse arising from disease such as leprosy, would be such a disqualification. So also a person who is a lunatic or idiot is not entitled to succeed to another. All these disqualifications do not, after the Hindu Inheritance (Removal of Disabilities) Act of 1928, operate as disqualifications under the Mitakshara, except congenital lunacy and idiocy. Unchastity disqualifies a woman from inheriting to a male under the Dayabhaga but under the Mitakshara this disqualification operates only in the case of the widow¹³³. So also illegitimacy of the claimant, except among Sudras, operates as a bar to inheritance. The religious disqualification imposed by the Hindu Law on an apostate has been done away with by the Caste Disabilities Removal Act of 1850. In addition to the above disqualifications, Courts of law have laid down that on grounds of justice and equity no one should be allowed to succeed to the estate of the person whom he has murdered. All these disqualifications are, however, purely personal and do not affect the next heir even though he happens to claim through the disqualified heir.

(131) *Sarasu Bala v. Jyotirmoyee*, 59 C. 142 (P.C.).

(132) *Chelikani v. Appa*, 20 M. 207 affirmed in 25 M. 678 (P.C.).

(133) Under the Hindu Women's Rights to Property Act, 1937, the unchastity of the widow is no bar to her claim to inherit.

Asceticism.—The adoption of asceticism operates as civil death of the ascetic, provided it takes the form of an absolute abandonment of all secular property and final withdrawal from earthly affairs. Such renunciation opens the succession to his property to his heirs. It has been held, however, that asceticism which would operate as civil death is not open to the Sudras.¹³⁴

Vesting and divesting.—The right of succession to an estate of a deceased owner vests immediately on his death on his then nearest heir and cannot be held in abeyance except when a nearer heir is in the womb. Once the estate has thus vested in the nearest heir, it cannot be divested by the subsequent birth of a nearer heir unless the latter was in the mother's womb at the time the succession opened. The only exception to this rule is that an estate vested in another as heir of the last male holder becomes divested by an adoption introducing a nearer heir.¹³⁵

Fresh stock of descent.—Inheritance is always to be traced to the last full owner who becomes a fresh stock of descent. Such owner may be a male or a female. But except in the case of Stridhana and in certain cases of descent in the Bombay Presidency, property obtained by a female by inheritance whether to a male or to a female is held by her as a qualified owner so that she cannot become a fresh stock of descent in respect of that property.

Modes of devolution—Survivorship and inheritance.—There are two modes of devolution recognised by the Hindu Law, succession by survivorship and succession by inheritance. Both the modes are operative under the Mitakshara law of joint family, while only the latter mode is recognised in respect of a Dayabhaga joint family. But in the case of widows or daughters jointly inheriting to a male, they take the property with rights of survivorship both under the Dayabhaga and the Mitakshara.

Joint-tenancy and tenancy-in-common.—The general rule is that in case of obstructed inheritance two or more persons succeeding to an estate take the property as tenants-in-common and not as joint tenants and that the doctrine of survivorship is limited in its application to unobstructed succession. To this, the exceptions are these: co-widows in all schools, co-daughters except in the Bombay Presidency, sons of the same daughter living jointly except under the Dayabhaga, and coparceners under the Mitakshara succeeding to the self-acquired property of their paternal ancestor, father, father's father or father's father's father.

Principle of representation.—When a paternal ancestor dies, his son, his grandson who is the son of a predeceased son, and his great-grandson whose father and grand-father are both dead, succeed as coparceners, the grandson representing his father and the great-grandson representing his grandfather. This rule of representation does not apply to any other case of succession in Hindu Law, except in the case of brothers and brother's sons in the Mayukha.

Heirs under the Mitakshara.—The law of inheritance applies only to a person's absolute property. Under the Mitakshara propinquity and not capacity to offer religious benefit to the propositus is the test of heirship, though the doctrine of religious benefit may be resorted to, to resolve doubtful questions of propinquity.¹³⁶ The heirs under

(134) *Krishnay v. Hommaredi*, 58 B. 536.

(135) *Amarendra v. Sanatan*, 12 P. 642 (P.C.).

(136) *Vedachala v. Subramana*, 44 M. 753.

the Mitakshara are classified under three heads: (1) Sapindas, (2) Samanodakas and (3) Bandhus. Sapindas are the six agnatic relations in the male line whether ascending or descending, the wives of the six paternal ancestors in the male line, the six male descendants in the collateral line of each of the six paternal ancestors, and the widow, daughter and daughter's son of the propositus, in all 57 in number. The Samanodakas of a person are his agnatic male relations in the ascending or descending line from the 7th to 13th degree, the male descendants in the male line upto the 13th degree of each of those ascendants and the male descendants in the male collateral line from 7th to 13th degree of the agnatic descendants upto the 6th degree, in all 147 in number.¹³⁷ A bandhu is a sapinda (ascertained according to the rules with reference to marriage) related to the propositus through one or more female links either directly or through a common ancestor paternal or maternal. A bandhu is thus a cognate relation and comes in the order of succession only after the technical sapindas and samanodakas.

ORDER OF SUCCESSION AMONG SAPINDAS

Heirs 1 to 3—Son, grandson and great-grandson of a deceased ancestor inherit to him jointly taking the estate as a single heritage. Where a father was joint at the time of his death with only some of his sons, these take the father's property whether ancestral or self-acquired to the exclusion of the divided sons.¹³⁸

Heir 4 Widow.—On the failure of the son, son's son or son's son's son, the widow, if not unchaste, succeeds to the estate taking only a limited interest therein.¹³⁹ On her death, the person entitled to succeed to the estate is the then nearest heir of her husband and not her nearest heir. If a widow who has succeeded to her husband's estate, subsequently remarries, she forfeits that estate even when she has married according to the custom of the caste¹⁴⁰ but her mere unchastity does not entail such forfeiture.¹⁴¹

Heir 5. Daughter.—After the widow comes the daughter, also taking only a limited estate. When there are more daughters than one, unmarried daughters take to the exclusion of married ones, and if all of them are married, the daughters unprovided for exclude those who are rich. But an illegitimate daughter is not entitled to inherit even among Sudras.

Heir 6. Daughter's son—After the daughter or daughters comes the daughter's son who takes the property absolutely. When there are two or more sons of daughters they take the property as tenants-in-common except that those who are sons of the same daughter and living as members of a joint family take the property with rights of survivorship *inter se*. The right of a daughter's son does not arise so long as any daughter is alive.

(137) *Amaram v. Bagrao*, 62 I.A. 139-1935 P.C. 57.

(138) *Narasimham v. Narasimham*, 55 M. 577; *Fakrooja v. Yelloppa*, 22 B. 101. But *contra* in *Badri Nath v. Hardeo*, 6 Luck. 649.

(139) Under the Hindu Women's Rights to Property Act, 1937, a widow though unchaste succeeds to her husband's property along with his sons and is entitled to share as a son.

(140) *Saptala v. Badarwar*, 50 C. 727. See *contra* in *Mangal v. Bharti*, 49 A. 203.

(141) *Monaram v. Kery Kachani*, 5 C. 776 (P.C.).

Heir 7. Mother —Like the widow, she takes only a limited estate. The term "mother" includes "adoptive mother" but not a "step-mother." Under the Mayukha the father comes in before the mother. Neither her unchastity nor her remarriage prevents her from inheriting to her son.

Heir 8. Father

Heir 9. Brother —Where there are two or more brothers, they take as tenants-in-common, full brothers excluding half brothers and undivided full brothers excluding divided full brothers. Under the Mayukha, brothers of the half blood come in only with the father's father.

Heir 10 Brother's son —The rule of preference of the full blood over half blood applies also to brother's sons and in the case of all other relations in the same degree.¹⁴³

Heir 11, etc. Brother's son's son, etc —There is no clear indication in the Sanskrit texts as to who is to succeed in the absence of the brother's son. But the decision of the Privy Council in *Buddha Singh v Lattu Singh*¹⁴³ preferred Dr. Sarvadhakari's view to that of the Madras High Court in *Chinnaswami v. Kunju*¹⁴⁴ and held that the brother's son in the texts included a brother's grandson also. According to this view, before ascending to the collateral line of the next remoter ancestor for purposes of ascertaining the heir, the three descendants of the nearest ancestor must be let in. Accordingly, the order of heirs, as given by Dr. Sarvadhakari, are (12) Father's mother, (13) Father's father, (14) Father's father's son, (15) Father's father's son's son, (16) Father's father's son's son's son, (17) Father's father's mother, (18) Father's father's father, (19) Father's father's father's son, (20) Father's father's father's son's son, (21) Father's father's father's son's son's son, (22) Son's son's son's son, (23) Son's son's son's son's son, (24) Son's son's son's son's son's son, (25) to (27) Father's S¹ to S³, (28) to (30) Father's father's S¹ to S³, (31) to (33) Father's father's father's S¹ to S³, (34) to (37) F¹ and F²'s S¹ to S³, (38) to (41) F³ and F⁴'s S¹ to S³, (42) to (45) F⁵ and F⁶'s S¹ to S³, (46) to (48) F⁷'s S¹ to S³, (49) to (51) F⁸'s S¹ to S³, (52) to (54) F⁹'s S¹ to S³.

Statutory heirs —The Hindu Law of Inheritance (Amendment) Act (II of 1929) introduced four more persons in the order of succession among sapindas, these being the son's daughter, daughter's daughter, sister and sister's son. These heirs in the order here given are entitled to rank in the order of succession next after the father's father and before a father's brother. The term "sister" includes a half-sister.

In addition to the above, the Hindu Women's Rights to Property Act of 1937, has introduced two more heirs namely, the widow of a predeceased son and the widow of a predeceased son of a predeceased son, and under that Act, these two widows succeed along with the sons and widows of the propositus.

Order of succession among Samanodakas —Among Samanodakas, succession is governed by the rules that a remoter line is excluded by a nearer line and a remoter kinsman in a particular line is excluded by a nearer kinsman in that line.

(142) *Garuddas v. Laldas*, 1933 P.C. 141.

(143) 37 A. 604 42 I.A. 208.

(144) 35 M. 152.
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Bandhus—A bandhu, meaning "one bound", is a sapinda related to the propositus through one or more female links either directly or through a common ancestor, paternal or maternal. This sapinda relationship should be traced according to the rules given for ascertaining that relationship for purposes of marriage, and in order to entitle a man to succeed to another as a heritable bandhu, there must be a mutuality of sapindaship between them.¹⁴⁵ These bandhus fall into three groups, (i) *Atma bandhus* (ii) *Pitru bandhus* and (iii) *Matru bandhus*. *Atma bandhus* are cognate descendants of the father's father or mother's father. *Pitru bandhus* are such descendants of the father's father's father or father's mother's father and *matru bandhus* are similar descendants of the mother's father's father and of the mother's mother's father. In other words, *atma bandhus* are cognate relations of the propositus in (1) his own line, (2) his father's line, (3) the line of his father's father and (4) the line of his mother's father. All the other bandhus are either *pitru bandhus* or *matru bandhus* according as they are related through the father or the mother of the propositus. In ascertaining the order of succession among the bandhus, the following rules have got to be applied

(i) *Atma bandhus* succeed before *pitru bandhus*, and *pitru bandhus* succeed before *matru bandhus*.¹⁴⁶

(ii) Among bandhus of the same class, propinquity or nearness of blood is the test of preference. Propinquity is to be determined by the proximity of the claimant's lines, and hence a claimant in a nearer line excludes one in a remoter line.

(iii) Where the degree of blood relationship furnishes no certain guide, the test to be applied is the test of spiritual benefit as explained under the Dayabhaga rules of inheritance. But the spiritual test is inapplicable where the test of propinquity does not fail to guide.¹⁴⁷

(iv) Among bandhus equally propinquitous, the half blood is excluded by the whole blood.

(v) Among bandhus equal in degree, a bandhu descended through a female is excluded by one descended through a male.

(vi) All other considerations being equal, a claimant between whom and the stem there intervene a less number of female links is to be preferred to one who is separated from the stem by a larger number of female links.

(vii) A male bandhu excludes a female bandhu.

Principles of succession in the Bombay School.—In the Bombay Presidency, by reason of the term "sapinda" in Manu's text being construed as "sapinda, male or female", a number of females have been let in as heirs either as *gotraja sapindas*, widows of such *sapindas* or bandhus. The female *gotraja sapindas* are the females born in the gotra or family, and these are the daughter, the sister, father's sister, son's daughter and daughter's daughter. These take the property absolutely, and when two or more daughters, sisters, etc., inherit together, they take as tenants-in-common and not as joint tenants with rights of survivorship *inter se*. The widows of *gotraja sapindas* are the widows of the sapindas and samanodakas of deceased, such as (1) son's widow, (2) brother's widow, (3) mother, (4) step-mother, etc.

(145) *Adi Narain v. Mahabir Prasad*, 48 I A. 86 1921 P.C. 53.

(146) *Ibid.*

(147) *Balambhram v. Subbaya*, 1938 P.C. 34.

These are the females who are related to the propositus by marriage. A widow of a *gotraja sapinda* can succeed only (i) if she has not remarried, (ii) after the sister and (iii) only if there is no qualified male *gotraja sapinda* within 7 degrees from the common ancestor in the line to which her husband belonged. When these conditions are satisfied she will succeed in the place occupied by her husband, that is, she will succeed only if there is no widow of a nearer *gotraja sapinda*, either in the same line or in a nearer line. The nature of the estate that a widow of a *gotraja sapinda* takes depends upon whether she inherits to a male or to a female, if she inherits to a male she takes a limited estate, but if to a female, an absolute estate. The *female bandhus* are the daughters of descendants ascendants and collaterals upto the 5th degree and the test to be applied in ascertaining their order of succession is the test of nearness of blood. (See the Table in Section , 459)

Principles of succession under the Dayabhaga — There are three classes of heirs under the Dayabhaga. (1) sapindas, (2) sakulyas, and (3) samanodakas. This classification is based upon the significance of certain offerings to the ancestors at the ceremony called the *Pargana Shradh*. This is the *Shradh* performed during each conjunction of the Sun and the Moon when certain oblations are presented to the deceased ancestors in the shape of *pindas*, *pinda lepas* and *udaka* (water). *Pindas* are the entire balls of food addressed to the father, father's father and father's father's father, their respective wives, and the mother's father's mother's father's father and mother's father's father's father's father. *Pinda lepas* are the remnants of those balls or *pindas*, which are offered to the paternal ancestors from the 4th to the 6th degree (F⁴ to F⁶). *Udaka* or water is then offered to the agnatic ascendants from the 7th to the 13th degree, that is, seven ancestors above the remotest ancestor to whom *pinda lepa* is offered. The sapinda relationship arises out of the capacity to benefit by the offering of the *pinda*, the *sakulya* relationship out of the capacity to benefit by the offering of the *pinda lepa*, and the samanodaka relationship out of the capacity to benefit by offering the *udaka*. Any one of these relationships may arise in one of three ways, (i) by offer, (ii) by acceptance and (iii) by participation. A Hindu is said to participate in the benefit of oblations tendered to those ancestors to whom he himself is bound to offer them. Thus he who is bound to offer *pinda* to the deceased, he to whom the deceased was bound to offer *pinda* during his lifetime and he who is bound to offer *pinda* to one to whom the deceased himself is bound to offer it if alive, are all sapindas of the deceased. In the same way the *sakulya* relationship and the samanodaka relationship arise. Among these three groups of relations, the sapindas exclude the sakulyas and the sakulyas exclude the samanodakas. The following rules determine precedence among the sapindas. See the Table in Section 462)

(i) Those who offer to the propositus or to his paternal ancestors, and such paternal ancestors exclude his maternal ancestors and those who offer only to the maternal ancestors

(ii) An ancestor takes before his descendants in the collateral line.

(iii) Those who offer paternal offerings or first maternal offerings to the propositus exclude those who offer them to ancestors.

(iv) Those who make paternal offerings and first maternal offerings to a nearer ancestor exclude those who make them to a remoter ancestor.

(v) Those who make paternal offerings exclude those who make maternal offerings

(vi) Those who make 2nd and 3rd maternal offerings to the propositus exclude those who make them to ancestors.

(vi) Those who make such 2nd and 3rd maternal offerings to a nearer ancestor exclude those who make them to a remoter ancestor.

(vii) Those who make nearer paternal offerings to the same ancestor exclude those who make remoter paternal offerings.

NOTE.—(a) Paternal offering here means an offering made to a paternal ancestor of the offerer, and, in the same way, a maternal offering means an offering made to a maternal ancestor of the offerer.

(b) First maternal offering means an offering made to offerer's first maternal ancestor. So also in the case of paternal offering. Nearer offering, paternal or maternal, means an offering made by one who is nearer the ancestor to whom the offering is made.

Female heirs under the different schools—The texts expressly mention the following females as heirs to a male, namely, widow, daughter, mother, father's mother and father's father's mother. All these come under the class of sapindas and are recognised as heirs in all the schools. In addition to these the widowed daughter-in-law and the widowed grand-daughter-in-law are brought in as heirs under all the schools by the Hindu Women's Rights to Property Act of 1937, and the sister, son's daughter and daughter's daughter are brought in among the sapindas as statutory heirs in Provinces governed by the Mitakshara School as a result of the Hindu Law of Inheritance (Amendment) Act of 1929. Besides these, the Madras School recognises as heritable female bandhus the brother's daughter, sister's daughter and father's sister, and the Bombay School brings in a large number of females as heirs under the designation of female gotraja sapindas and widows of gotraja sapindas as already seen.

Non-relations as heirs—In the absence of relations above mentioned, the preceptor, the pupil and the fellow student in respect of religious institution, inherit in the order in which they are here mentioned¹⁴³ and where none of these exists, the property escheats to the Crown.¹⁴⁴

STRIDHANA

What is Stridhana.—Stridhana is property in the hands of a woman over which she has absolute powers of disposition. Such property may be:

(i) property gifted to a woman in her maiden state or at the time of her marriage or during her widowhood. Property gifted to a woman during coverture is also her Stridhana except that under the Dayabhaga and the Mithila Schools, property given by a stranger during coverture is subject to her husband's dominion and becomes her absolute property only after his death,

(ii) the self-acquisition of a woman except that under the Dayabhaga such acquisition made during coverture becomes her absolute property only after her husband's death,

(iii) property purchased by a woman with her Stridhana or its income,

(iv) property inherited by a woman in the Bombay Presidency as a *gotraja sapinda* from a male or as an heir to the Stridhana property of another female,¹⁴⁵

(143) *Sambasivam v Secretary of State*, 44 M 704 41 M.L.J. 109.

(144) *Collector of Masulipatnam v Cuddy Velletia*, 8 M.I.A. 500, *Girdhar Lal v Bengal Government*, 13 M.I.A. 448.

(145) *Bhan v Faghunath* 30 B 229, *Balwant Rao v Baji Rao*, L.R. 47 I.A. 223; 39 M.L.J. 166; 48 C. 30.

- (v) property acquired by a woman by adverse possession,
- (vi) maintenance awarded to a woman;
- (vii) property allotted to mother or father's mother on a partition by way of absolute transfer to her; and

(viii) property acquired by a woman as the gains of her prostitution or under a compromise giving her property absolutely.

NOTE.—Except as mentioned in Cl. (iv) any property inherited by a female is taken by her only as a qualified owner, whether the inheritance is to a male¹⁵¹ or to a female.¹⁵² So also share allotted to a mother or the father's mother on partition, unless it has been transferred to her by way of absolute gift as Stridhana, is taken by her only as a limited owner.¹⁵³

Powers over Stridhana.—A maiden and a widow, provided they are not minors, have absolute powers of disposition over their stridhana property, and can dispose of it by gift or will. But the rights of a married woman during coverture vary according as the Stridhana property is *Saudayika* (gift from relations) or not. *Saudayika* includes *yautaka* (gifts received at the time of the marriage) as well as its negative *ayautaka*. In respect of *saudayika* she is the absolute owner, though in times of extreme distress as in famine, illness or imprisonment, or for the performance of indispensable duty, the husband can take and utilise it for his personal purposes.¹⁵⁴ But in the case of *non-saudayika* property, the husband's consent is a condition precedent to her power of disposal,¹⁵⁵ and he is entitled to use it for his own purposes even in the absence of any compelling necessity. But after his death, her power of disposition becomes unfettered. Even during the life-time of the husband, the wife does not cease to be its owner though the husband has the right above referred to, and if she dies during the husband's life time, the property is taken by her Stridhana heirs and not by the heirs of her husband.¹⁵⁶

Succession to Stridhana.—The principles regulating the devolution of Stridhana property are different from those applicable to succession to the property of males. The religious element is not a factor that enters into the question of preference among the claimants, the only ground of preference being propinquity. Female issue is preferred to male issue and co-heirs take as tenants-in-common and not as joint tenants. Heirs like daughters' daughters, daughters' sons and sons' sons take *per stirpes*. The order of succession to Stridhana varies according to the school to which its owner belongs, her status at the time of acquisition and the source from which it came and no general rules can be laid down for determining priority between two rival claimants. The Mitakshara divides Stridhana property into (i) maiden's property (ii) *sulka*, and (iii) other stridhana. The order of succession to maiden's property is (i) uterine brother, (ii) mother, (iii) father, (iv) father's sapindas in order of propinquity, and (v) mother's kinsmen in order of propinquity. *Sulka* differently defined as the present to induce the bride to go with her husband or as the amount paid as equivalent of the price of household utensils, ornaments, etc., passes first to uterine brothers, then to the mother, then to the father

(151) *Bhagvandeem v. Myna Bai*, 11 MIA 487.

(152) *Shee Shanker v. Debi Sahai*, 25 A 468 (P.C.).

(153) *Debi Mangal Prasad v. Mahadeo Prasad*, 34 A. 234 (P.C.); *Harmangiri v. Kedarnath*, 16 C 758 (P.C.).

(154) *Nammalwar v. Thyagaraswami*, 50 M. 941.

(155) *Bhau v. Raghunath*, 30 B. 229.

(156) *Saleema v. Lutchamma*, 21. M. 100.

and then to the father's heirs. The order of succession to other Stridhana is as follows: (i) unmarried daughters, (ii) married daughters unprovided for,¹⁸⁷ (iii) married daughters provided for, (iv) daughter's daughters, (v) daughter's sons, (vi) sons, (vii) son's sons, (viii) husband (ix) husband's sapindas,¹⁸⁸ (x) blood relations like mother, father, and their kinsmen,¹⁸⁹ (xi) the Crown. If the marriage of the deceased woman is in the unapproved form, the order of succession after son's sons is mother, father, father's heirs,¹⁹⁰ the Crown. The order of succession in other Schools is so confusing that this is not the proper place for its elaborate enumeration.

Gains of Prostitution—Prostitution may be practised either by married or unmarried women or by women who belong to a class or community like the Dancing Girl community, in which it is practised as an *achara* or customary rule. In the case of a family woman lapsing into prostitution, the gains of her prostitution and other Stridhana would pass according to the normal order of succession applicable if she were chaste, and her legitimate son will exclude her illegitimate daughters, and her husband will exclude her illegitimate son.¹⁹¹ But in the case of dancing girls amongst whom prostitution is practised as a sort of *kulachara* or rule of life, there is no distinction between legitimate and illegitimate issue.¹⁹² The women among them being the chief earning members, they take the property inherited by them absolutely, and daughters, whether natural or adopted, exclude sons.

WOMEN'S ESTATE

What is woman's estate—The term "woman's estate" is used in the sense of a limited estate taken by a female as distinguished from her Stridhana property in which she takes an absolute interest. Property in which a woman takes only a limited interest is either property inherited by a woman or property allotted to her in a partition in her husband's family. To the rule that property inherited by a woman either from a male or a female is taken by her as a qualified owner, there are two exceptions recognised in the Bombay School, namely, (i) property inherited by a woman born in the *gotra* of the deceased, or the daughter of such woman, and (ii) property inherited by a female from a female. Barring these two exceptions every woman to whichever school she belongs takes on inheritance only a limited estate.¹⁹³ The distinctive feature of a woman's estate is that at her death it reverts to the heirs of the last full owner known as reversioners. She is absolutely entitled to the fullest benefit of her life-interest and is accountable to none in respect of its income. Her estate is not a life-estate, for, under certain defined contingencies, she can alienate the property absolutely. Of such limited estates taken by women, the estate of the widow is the typical and most important one and hence is alone considered in the following pages.

Widow's powers of enjoyment—Within the limits imposed upon her by law, a widow has the most absolute powers of enjoyment of her estate. She is accountable to none in respect of its income. As a corollary to her absolute powers of enjoyment, she

(187) *Woma Das v. Gookoolchand*, 3 C. 587 (F.G.).

(188) *Kashiba v. Hanraj*, 30 B. 491 (P.C.).

(189) *Gopal v. Secretary of State*, 45 B. 1106.

(190) *Raju v. Ammani*, 29 M. 358; *Gowid v. Sathir*, 43 B. 173.

(191) *Hiralal v. Tripathi*, 40 C. 650; *Mamabhai v. Mustawadi*, 38 M. 1144; *Narayan v. Laxman*, 51 B. 784.

(192) *Sae Vismannatha v. Dorayyanna*, 46 Mad. 944.

(193) *Collector of Madulphatam v. Chooly Pankaj*, 8 M.L.A. 529; *Pankajanna v. Pankajaramannanna*, 25 M. 678 (P.C.).

is entitled to get possession of her whole estate and if she happens to be one of several co-widows and they cannot get on together amicably, she is entitled to a partition of the joint estate for purposes of separate enjoyment. She is not bound to economise or save from the income or pay out of it the debts of the husband. She has absolute powers over accumulations of income accruing after her husband's death and such accumulations do not form part of the husband's estate so as to be descendible to his heirs after her death unless she indicates her intention to treat them as accretions to her husband's estate¹⁶⁴. In addition to her absolute powers over the income of the estate, she has also got the power to sell or mortgage or give away her life-interest to whomsoever she likes, and if the income of the estate is insufficient for her maintenance, she is even entitled to alienate the corpus so as to pass to an alienee, an absolute interest in the property alienated

Her powers of management.—Being the owner of the estate vested in her by inheritance, she is entitled to manage it as any prudent owner of property, her powers being similar to those of the manager of an infant's estate as defined in *Hunooman Persaud's case*¹⁶⁵. If her acts of management do not constitute a waste of the corpus or a danger to the reversion, she cannot be restrained therefrom. As she fully represents the estate for the time being, she is entitled to enter into transactions for the proper management of the estate and can incur debts for the necessary purposes, and the fact that the debts are simple debts is no ground for holding that if the widow dies before a decree is obtained in respect of such debts, the debts are not binding on the reversioners¹⁶⁶. A compromise or family arrangement entered into by her which is prudent and reasonable under the circumstances and in the interest of her estate will be binding upon the reversion¹⁶⁷. She can sue to recover possession of the estate or a part thereof from trespassers, defend suits against the estate, incur debts in its management and do everything as the representative of the estate which any prudent owner would do. Any decree passed against her as representing the estate is binding upon the reversioners if the suit was fought out according to law and was not collusive or fraudulent¹⁶⁸.

Her powers of alienation.—Though a widow can alienate her own life interest in the property irrespective of any question of necessity justifying the alienation, her powers of disposal over the corpus are limited. She can on no account dispose of her husband's estate by will and she can dispose of the property *inter vivos* only for legal necessity or benefit.¹⁶⁹ Such necessity or benefit may be either religious or secular. The actual obseques of the husband and the periodical performances of the obsequial rites prescribed in the Hindu religious law, the marriage of his daughters, payment of husband's debts though barred, and any other indispensable act or duty which cannot be neglected without sinning come under the category

(164) *Ayyaswamydas v. Swamy*, 49 M. 116; *Soorjmoney Dastge v. Denabundoo*, 9 M.L.A. 125; *Sandamoni v. Administrator-General of Bengal*, 20 C. 433 (P.C.); *Akkanna v. Venkayya*, 25 M. 351; *Isri Das v. Hansabutti*, 20 C. 324 (P.C.)

(165) 6 M.L.A. 393

(166) *Dhanda Tekchand v. Mishra Lal*, 60 B. 311.

(167) *Ramsayram Prasad v. Shyam Kumari*, 1 Pat. 741 (P.C.); *Maja Prasad v. Nagasahar*, 47 A. 883 (P.C.).

(168) *Rajalakshmi v. Bhalegama*, L.R. 65 I.A. 365; (1938) 2 C. 653; (1938) 2 M.L.J. 832 (P.Q.).

(169) *Collector of Manipal v. Caval Venkata*, 8 M.I.A. 529.

of spiritual necessity justifying the alienation of even the whole of the corpus. Under the category of temporal or secular necessity come arrears of Government revenue, reasonable expenses of necessary litigation in preserving the estate or defending her title, expenses of maintenance of both the widow and other dependent members whom her husband was bound to maintain, marriage expenses of the girls in the deceased's family such as his sister or son's daughter, preservation of property and necessary repairs thereto and the cost of legal proceedings in respect of the effective vesting of the estate in her, such as the cost of obtaining probate, letters of administration or succession certificate. An alienation of the corpus by the widow may also be justified on the ground of benefit to the estate. Here again the benefit may be spiritual or temporal. Spiritual benefit as distinguished from spiritual necessity justifies an alienation of only a reasonably small portion of her husband's estate. If the property sold or gifted for performing acts conducive to the spiritual benefit of the deceased bears a small proportion to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, the alienation is justifiable and cannot be impeached by the reversioners.¹⁷⁰ Dedication of a small portion of the husband's estate for the daily offering of food to the presiding deity at Puri or raising money upon a small portion of the property for excavating a tank for a temple founded by her husband, or a sale of a small portion of the estate for the thread and marriage expenses of her daughter's son will all be justifiable on the ground of spiritual benefit. So also performance of the Shradh of the husband's relations which he himself was under a duty to perform, pilgrimage to Gaya to perform the husband's Shradh or pilgrimage to Sethuband but not to Benares, gift to priest at Gaya, etc., come under the category of spiritual benefit. But a widow is not entitled to alienate her husband's property for pious or religious purposes for her own spiritual welfare unless they are purposes conferring spiritual benefit on the husband also. An alienation is justifiable on the ground of secular benefit only if it is one for the benefit of the estate and such as a prudent owner would have made with the knowledge available to him at the time of the transaction.

Alienation and co-widows—Where two widows succeed as co-heiresses to their husband's estate, one of them cannot alienate the property without the consent of the other even though the alienation is for the necessity of the estate. They are entitled to obtain a partition of separate portions of the property and deal as each pleases with her own life-interest, but they cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of a future reversioner. If they act together, they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other cannot prejudice the latter's right of survivorship by charging or selling any part of the estate, and the mere fact that there has been enmity between the co-widows is no justification for the alienating widow omitting to ask the co-widow's consent for the alienation. But in cases where the concurrence of the co-widow has been asked for to an alienation for a necessary purpose and unreasonably refused, an alienation by the other co-widow would be binding on the whole estate.¹⁷¹

Widows alienation and onus of proof.—An alienance from the widow is in the same position as an alienance from the manager for an infant heir as defined in *Hunooman Persaud's case*.¹⁷²

(170) *Sardar Singh v. Kunj Behari*, 44 A. 503 (P.C.).

(171) *Gauri Nath Kalyan v. M. J. Ganga Rao*, 55 I.A. 399; 28 L.W. 378.

(172) 6 M.L.A. 393.

In order to get his alienation upheld, the alienee must establish either that the alienation was in fact justified by necessity or benefit of the estate or that he made *bona fide* enquiries which made him believe that such necessity existed for the alienation even though such necessity was subsequently not shown to have existed in fact at the time of the alienation.¹⁷³ Where the presumptive reversioners consent to an alienation either of the whole or a part of the estate by a limited owner, in the absence of evidence to the contrary, their consent is *prima facie* evidence or presumptive evidence of the existence of circumstances which would be sufficient to constitute necessity and which would be sufficient to bind the reversioners. This presumption of necessity arising out of the consent of the reversioners is, however, only a rebuttable presumption, and ordinarily to get the benefit of this presumption, the consent of the whole body of reversioners constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.¹⁷⁴ Again, in the case of ancient alienations, recitals as to necessity contained in the deed of alienation consistent with the probabilities and circumstances of the case would be sufficient to support the deed of alienation where evidence of actual necessity was not and could not be forthcoming.¹⁷⁵ Even where a deed of alienation by a widow does not contain recitals as to necessity, if the validity of the alienation comes in question a long time after the alienation so that it is impossible to ascertain what were the circumstances in which it was made, presumptions are permissible to fill in the details which have been obliterated by time and it would be open to the Court to assume that the alienation was made for necessity so as to be binding upon the reversioners.¹⁷⁶ Where the presumptive reversioner has given his consent to an alienation, he is precluded from questioning its validity if on the death of the widow he happens to be the actual reversioner.¹⁷⁷

Rights and remedies of reversioners—A reversionary heir, although having only a contingent interest or *spes successionis*, is entitled to see that the estate is kept free from waste or danger during its enjoyment by the widow. He is entitled to institute a suit even during the lifetime of the widow for a declaration that an alienation made by her is not binding on the reversion. He can also institute a suit to restrain the widow from committing waste. But such a suit should ordinarily be filed by the next presumptive reversioner, but if he refuses to institute the suit or has precluded himself by his own act or conduct from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the reversioner next to him would be entitled to sue.¹⁷⁸ But no suit lies for a declaration during the widow's lifetime that a will executed by her is invalid or that the plaintiff is the nearest reversioner.¹⁷⁹ The reversioners are also entitled to have a receiver appointed in respect of the estate if the widow's management shows reckless waste. Where a suit is brought by the presumptive reversioner against the widow and the alienee from her for a declaration that the alienation is not binding upon the reversion, the suit is one in a representative capacity and

(173) *Hanumanth v. Subbaya*, 1936 P.C. 283

(174) *Rangaswami Goundan v. Nachappa*, 42 M. 523 (P.C.)

(175) *Banga Chandra v. Jagajiskore*, 44 C. 186 (P.C.)

(176) *Kumaram v. Narayanaswami*, 36 L.W. 186, *Venkataram v. Nan. Sahiba*, 43 M. 541 (P.C.).

(177) *Ramakrishna v. Varadacharya*, 52 M. 556 (F.B.)

(178) *Rani Anand Kuyoor v. Court of Wards*, 6 C. 764 (P.C.), *Lakshmi Ammal v. Anantharamo*, I.L.R. (1937) M. 1948

(179) *Janaki Ammal v. Narayanaswami*, 39 M. 634 (P.C.)

on behalf of all the reversioners, and hence a decree passed in that suit which is not vitiated by any fraud or collusion between the parties thereto will have the effect of *res judicata* between the alienor or his representatives on the one hand and the whole body of reversioners on the other.¹⁸⁰ These are the rights and remedies of reversioners during the widow's lifetime. But when a widow dies, the nearest reversioners who succeed to the estate are entitled to recover possession of the properties from all those in possession thereof under alienations not binding on them. This right to bring a suit for possession, after the widow's lifetime is not taken away by the reversioner's failure to bring a declaratory suit during the widow's lifetime to declare the alienations invalid,¹⁸¹ and in a single suit for possession all the alienees from the widow may be impleaded and relief obtained against all of them.¹⁸²

Alienor's equities—It is not always necessary, to uphold a widow's alienation, that it should have been justified by necessity or benefit, spiritual or secular. If the alienor establishes *bona fide* enquiry and honest belief as to existence of necessity or benefit, then he is entitled to have his alienation upheld against the reversioners. Besides, if the alienation itself is justified by legal necessity and the alienor acts in good faith and the consideration is fair and proper, the mere fact that a part of the consideration which cannot be regarded as inconsiderable has not been proved to have been applied for necessary purposes cannot invalidate the alienation.¹⁸³ Even where the alienation is set aside, the alienor is entitled to a charge upon the estate for all amounts advanced by him to the widow for purposes for which she would be entitled to alienate the property. Besides the alienor would also be entitled to compensation for any improvements effected by him on the estate *bona fide* believing that his ownership would not be disturbed.

Surrender—A Hindu widow can renounce the estate in favour of the nearest reversioners, and by a voluntary act efface herself from the succession as effectively as if she had then died. This voluntary self effacement is called a surrender. The essentials of a valid surrender are (i) it must be in favour of the whole body of the nearest reversioners and not in favour of only some of them,¹⁸⁴ (ii) it must not be partial and must be in respect of the entirety of the estate of which she stands possessed at the time,¹⁸⁵ (iii) it must be *bona fide* and not a device to divide the estate with the reversioners,¹⁸⁶ though a reasonable provision for the widow's maintenance even by way of absolute transfer of a small portion of the property would not render the surrender otherwise than *bona fide*.¹⁸⁷ A surrender in favour of remote reversioners with the consent of the nearest reversioners is to be considered as a double surrender and held valid.¹⁸⁷ A surrender otherwise valid cannot be attacked on the ground that it was prompted not by proper motives. A surrender deprives the widow of only her

(180) *Main Prasad v. Nagethar*, 47 A 883 (P.C.), *Venkatanarayana v. Subbammal*, 38 M 406 (P.C.)

(181) *Byoy Gopal v. Krishna*, 34 C. 329 (P.C.)

(182) *Darbari v. Gubind*, 46 A 822

(183) *Surya Ban v. Sat Chann*, 53 M L J 300 (P.C.) following *Krishna Das v. Rajhu Ram*, 52 M L J. 720. 48 A. 149 (P.C.)

(184) *Rangaswami v. Nachappa*, 42 M. 523 (P.C.), *Radharam v. Brindaram*, (1939) 1 M.L.J. 245. 41 Bom. L.R. 699 1939 P.C. 27

(185) *Man Singh v. Naulakhat*, 5 Pat. 290 (P.C.).

(186) *Sureshwar v. Maheshwari*, 48 C 100 (P.C.), *Bhagwati v. Dhanukdhari*, 47 C. 466 (P.C.)

(187) *Nobokishore v. Hari Nath*, 10 C 1102 (F.B.), *Pandurang v. Ishwar*, 40 Bom. L.R. 1270

husband's estate and not her Stridhana property or her right to be maintained out of the husband's estate. But the surrender does enable the next reversioners to recover even during the widow's lifetime properties improperly alienated by the widow.¹⁸⁸

Remarriage and divestment of estate.—A Hindu widow who has inherited her husband's estate must be held to forfeit that estate on her remarriage, though the remarriage is after her conversion to another religion¹⁸⁹ or under the custom of the caste allowing remarriage¹⁹⁰ as the expression "any widow" in section 2 of the Hindu Widow's Remarriage Act plainly means in the context any woman who was a Hindu when she was widowed and who remarries whether under or outside the Act. But the mere fact that the widow has become unchaste subsequent to her having inherited her husband's property does not divest her of that property.¹⁹¹

RELIGIOUS AND CHARITABLE ENDOWMENTS

Definition of endowment.—Endowment is dedication of property for purposes of religion or charity having both the subject and object certain and capable of ascertainment. A charitable endowment is the outcome of benevolence, e.g., an endowment for a hospital, an endowment for the advancement of education, an endowment for building tanks or wells, etc. A religious endowment is the outcome of piety, e.g., endowment for the performance of Lakshmi Puja, building temples or mutts, etc. An endowment becomes effective from the moment of dedication and becomes unalterable or irrevocable thereafter, except that in the case of a dedication to a family idol, the endowment may be altered by the consensus of the whole family. To constitute a valid endowment what is given and to whom it is given must not be left vague and uncertain. Hence a gift to "Dharam," which means "law, virtue, legal or moral duty", is invalid, since the object of the gift is too vague for giving effect to the gift.¹⁹² So also gifts for purposes of popular usefulness or benefit, for charitable and religious purposes, for "just and proper acts for my benefit", are all void for vagueness and uncertainty.

Who can endow.—Every Hindu who is of sound mind and a major can create a valid endowment in respect of the whole or part of his or her absolute property. Besides, a karta of the joint family and a widow having a limited estate, can dedicate a reasonably small portion of the estate for religious purposes.

Temples and mutts.—The temples and mutts which are by far the most important religious foundations in India are supplementary in the Hindu ecclesiastical system in furthering spiritual welfare, the former by affording opportunities for prayer and worship, the latter by facilitating spiritual instruction and the acquisition of religious knowledge. In the temple the presiding element is the deity, or idol, a juridical person, the management of whose property vests in a person known as *shebait* or manager, in a mutt, the whole assets of the institution are

(188) *Nagarval v. Dadhabai*, 1954 S.C.J. 34 (1954) M.L.J. 69 1954 S.C. 61.

(189) *Raghunath v. Lakshmi Bai*, 59 B. 417, *Vitta v. Hazenkonda*, 41 M. 1078; *Maharaj v. Ram Rutton*, 19 C. 289, contra in *Abdul Aziz v. Nirmal*, 35 A. 466.

(190) *Santala v. Badamwari*, 50 B. 727; *Murugan v. Viramakali*, 1 M. 226, *Mt. Suraj v. Atar*, 1 Pat. 706, contra in *Bhole v. Mt. Koushila*, 55 A. 24.

(191) *Moniram Kohla v. Keri Kolstani*, 5 C. 776 (P.C.).

(192) *Ranchordas v. Parvatibai*, 23 B. 725 (P.C.).

vested in the *mahant* in trust for the mutt, the *mahant* being the spiritual preceptor presiding over the mutt and superintending its affairs, both spiritual and temporal

Powers of a mahant or a shebait—It is competent to a *shebait* of a temple or a *mahant* of a mutt to incur debts and borrow money and even alienate the property of the institution for the proper expenses of keeping up the religious worship, repairing the debutter property, defending hostile litigation, etc., and in these respects his authority is analogous to that of the manager of an infant's estate.¹⁹³ as defined in *Hunooman Persaud's case*¹⁹⁴ Any alienation of the immovable property of the institution by a *shebait* or *mahant* which is not justified by benefit to the institution or its necessity is avoidable by his successor in office within 12 years from the date when the alienor ceased to hold the office by death or removal¹⁹⁵ and a permanent lease stands on the same footing as an absolute alienation¹⁹⁶ But an alienation, though not so justified, cannot be avoided by the alienor himself and is good so long as he is in office¹⁹⁷ Where an alienation is questioned, the burden of proving benefit or necessity in justification of the alienation is on the alienee in the same way as it is in the case of alienation by the manager of an infant's estate The property being the property of the institution, its income cannot be diverted for the personal purposes of the manager, and if he spends any money out of his private pocket, he is entitled to have it reimbursed He is not debarred from making self-acquisitions, and there is no presumption that property in the possession of a *mahant* or *shebait* belongs to the mutt or the temple.

Alienation of office—The rule of necessity justifying an alienation extends only to an alienation of the temporalities of the idol or the mutt and does not apply to an alienation of the office of the *mahant* or *shebait* which is *res extra commercium*, and hence a sale of such office either in execution of a decree or privately for the pecuniary advantage of the trustee, though sanctioned by custom and made coupled with an obligation to manage the property in conformity with the existing trust, is void and gives no title to the purchaser.¹⁹⁸ But no objection exists to a transfer of the office to a person in the line of succession by renunciation, gift or will,¹⁹⁹ but if the gift or will is in favour of a stranger or a remoter relation in preference to nearer relations, the transfer is void and cannot be upheld unless it is sanctioned by custom and is to the benefit of the institution.

Removal of shebait and mahants—A shebait of a temple is liable to be removed from his office if he is guilty of fraud or dishonesty in respect of the funds or property of the institution, as when he misappropriates the temple funds or sets up a title to its property hostile to that of the institution. But mere mistake or error of judgment cannot operate as a ground for his removal In the case of a *mahant* he is incompetent to continue in office if he does anything inconsistent and irreconcilable with his position as the spiritual

(193) *Durganath v. Ram Chunder*, 2 C. 341 (P.C.); *Abharum v. Shivama Charan*, 36 B. 1003, *Proswara Kumari v. Golab Chand*, 2 I.A. 145.

(194) 6 M.L.A. 393.

(195) *Ram Churan v. Naurangi*, 12 Pat. 251 (P.C.); *Ponnambala v. Periana*, 59 M. 809 (P.C.).

(196) *Vidya Varathi v. Balasubramani Aiyar*, 44 M.L.J. 831 (P.C.); *Ponnambala v. Periana*, supra.

(197) *Sivaprasada v. Manickam*, 64 M.L.J. 577; 1933 M. 481

(198) *Rajah Varmah v. Ravi Varmah*, 1 M. 295 (P.C.); *Gnanasambanda v. Vela Pandaram*, 23 M. 271 (P.C.).

(199) *Manjharan v. Pranshankar*, 6 B. 298.

head of the mutt, as when he marries, takes to drink or leads a life of immorality and shame. But mere lunacy of the *mahant* is no ground for his removal, though during the time the lunacy lasts, a substitute from amongst those qualified to succeed him in the office may be appointed to function in his stead. Where a temple trustee or a *mahant* is removable by the majority vote among a body of persons entitled to appoint or remove him, the removal must be after due observance of the rules of natural justice and for a cause which is sufficient to justify removal, and the removal should be decided upon with reference to the votes of qualified voters given at a meeting duly summoned and conducted.

Devolution of the office of mahant—In the absence of any rule of succession laid down by the founder of the institution, the law relating to the devolution of the office is to be found in the custom or usage in the particular mutt. Muts may be *mouasi*, *Punchath* or *hakims*. In the first, the office is hereditary, devolving on a *mahant's* death on his chief disciple. In the second the office is elective, the successor to a presiding *mahant* being elected by an assembly of *mahants*. In the third the appointment of the *mahant* is vested in the ruling power or the founder of the institution. Where a *mahant* has the power to appoint his successor, as he often has in the case of a *mouasi* mutt, he cannot delegate or transfer that power to another, and must exercise it *bona fide* in the interests of the mutt, and not in furtherance of his own interests,¹⁰⁰ by nominating one who is competent to hold the office according to the usage of the institution. In the absence of a custom to the contrary, a nomination of a successor is not invalid merely because it is made by a will.

Devolution of the office of shebait—Shebaitship is presumed to be vested in the founder or his heirs, in default of evidence that he has disposed of it otherwise or there is some usage or course of dealing showing a different mode of devolution.¹⁰¹ The founder of a Hindu debutter is competent to lay down rules to govern the succession to the office of *shebait*, but he cannot create a line of succession unknown to Hindu Law,¹⁰² nor can he alter the line of succession once laid down by him unless there is a reservation to that effect in the trust deed itself.¹⁰³ Where the line of succession prescribed in the deed of endowment fails, the *shebaitship* reverts to the founder or his heirs, whether they be males or females, though when they happen to be females, they have to perform the spiritual functions by appointing male deputies.

Diversion of endowment.—The property of a public religious endowment can never be converted into secular property by the *shebait* or the members of the founder's family,¹⁰⁴ but in the case of a private endowment, as in the case of a dedication to the family idol, the consent of all the members of the family interested can convert the debutter property into secular property.¹⁰⁵ Where the original object of a public endowment cannot be carried out in the manner and form intended by the donor or where the literal execution of the trust is or afterwards becomes inexpedient or impracticable, the Court will execute the trust *cy pres*, that is, apply the funds to other objects of a similar character.¹⁰⁶ But in the case of an endowment to

(200) *Narasimha Thambiran v. Kotijagam Pillai*, 44 M. 283 (P.G.).

(201) *Gowami Sri Gridhrayi v. Ramanalayi*, 17 G. 3 (P.C.); *Sethuramamangalam v. Marudamangalam*, 41 M. 296 (P.C.).

(202) *Ganesh Chandra v. Lal Behary*, 69 I. A. 448 · 1936 P.C. 318.

(203) *Monorama v. Dhirendranath*, 34 C. W. N. 1087.

(204) *Kamgar Doorganath v. Ramachander*, 2 C. 341 (P.C.).

(205) *Chandi Charan v. Dulal Chandra*, 54 C. 30. But see *Surendra Krishna v. Bhobaneswar*, 64 C. 54.

(206) *Mayor of Lyons v. Advocate-General of Bengal*, 26 W. R. 1.

an idol, the religious purpose does not come to an end with the mutilation or destruction of the image, and the endowment can be perpetuated and continued by installing and consecrating a new image to be worshipped as intended by the original founder.²⁰⁷

IMPARTIBLE ESTATES

Creation and nature of an impartible estate—An impartible estate might have been created by a grant of the sovereign or by custom or by a family arrangement followed up in practice for many generations. The impartibility of an estate does not make it necessarily the separate property of the holder. No doubt even where an impartible estate is the property of a joint family, custom has deprived the members other than the holder of the estate of their right.

(i) to claim partition of the estate,

(ii) to restrain unauthorised alienations by the holder, and

(iii) to claim maintenance

But the right of survivorship is not inconsistent with the custom of impartibility and the birthright of the senior member to take by survivorship still remains.²⁰⁸ But an impartible estate may also be the separate property of the holder. Where an impartible zamindari has been acquired by him or his branch as a self-acquisition, the other undivided members of his family take no interest in it and it descends as the separate property of the acquirer. Besides, a joint family impartible estate may become the separate property of the holder by all the other members renouncing their claims to it.²⁰⁹ But in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint with reference to that estate, it is necessary to prove by strong and cogent evidence an intention, express or implied, on the part of the junior members to renounce their right of succession to that estate. Neither the fact that the junior members have been separate in food and worship for a considerable period of time nor the fact that they have exercised their right of partition over their partible property can divest them of their right of succession to the impartible estate.²¹⁰ But where the holder of an ancestral impartible estate, in the exercise of his absolute powers of alienation, gives that estate absolutely to one of his sons to the exclusion of the others, that son takes it as his separate property as against his brothers, so that on his death without male issue, his widow is entitled to succeed to that estate to the exclusion of his undivided brother.²¹¹

Incidents of an impartible estate—(i) In the absence of a custom to the contrary, an impartible estate is alienable by will as well as by transfer *inter vivos*.²¹² (ii) Except the sons of the present or the previous holder of an ancestral estate, a junior member of the family cannot claim maintenance in the absence of a custom in his favour.²¹³ (iii) Immovable properties in the nature of improvements on the estate form part of the estate and descend with it to the person entitled to the main estate. (iv) Where the self-acquisitions of the holder consist of both movable and immovable properties, his power to make them accretions to the estate is confined only to his immovable properties and does not extend to the movables or the income of the estate. The estate descends to a single heir, per stirpes being the rule of success-

(207) *Byjchand v. Chatterjee*, 41 C. 57

(208) *Baynath v. Tej Bahi*, 43 A. 228 (P.C.).

(209) *Konammal v. Annadana*, 51 M. 189 (P.C.)

(210) *Ibid*

(211) *Ulagalam Perumal v. Subbalakshmi Nachar* 1936 M. 721, affirmed by Privy Council in 66 L.A. 194; 1 L.R. (1939) Mad. 443; (1939) 1 M.L.J. 812

(212) *Shib Prasad v. Ram Prasad*, 59 C. 1399 (P.C.).

(213) *Rama Rao v. Rajah of Pithapur*, 41 M. 778 (P.C.); *Kumara Krishna v. Rameswara*, I.L.R. (1942) Mad. 419 (P.C.).

sion. Primogeniture may be general or lineal. In the case of the former, a relation who is nearer in degree though in a junior line is to be preferred to one in a senior line who will be the preferential heir under the rule of lineal primogeniture. In other words, degree prevails in general primogeniture, while line prevails in the lineal primogeniture. But ordinarily an impartible estate is governed by the lineal primogeniture and not the general primogeniture²¹⁴. Among sons of the deceased holder, the seniormost in age, though the son of a junior wife, excludes the others though they are born to the senior wives of the last holder.²¹⁵ But a younger son of the wife taken from a superior class excludes a senior son of an inferior wife,²¹⁶ and an *auras* son, though junior in age, excludes the adopted or the illegitimate son.²¹⁷

Position of females—If an impartible estate is the family property of a joint undivided family, the person entitled to succeed will be designated by survivorship and no female can succeed so long as there is a male member of the joint family qualified to take. But if the estate is held by one who is the sole surviving coparcener or it is his separate property, though he himself is a member of a joint family, on his death without male issue, the estate passes to his widow, daughter or daughter's son as in the case of the ordinary separate property of a coparcener²¹⁸. If a separated holder of an impartible estate dies leaving a widow and an illegitimate son, the former excludes the latter in the matter of succession. An impartible estate governed by the Dayabhaga law, though ancestral, partakes of the nature of the separate estate of its holder under the Mitakshara, and among claimants of the same degree of relationship, the full blood will exclude the half blood.²¹⁹

THE LAW OF THE MALABAR TARWAD

Constitution of a Malabar Tarwad.—Malabar popularly associated with magic and mysteries, differs in its law of joint family and succession from the rest of India, having a code of morals comparable to that of companionate marriage in the Western World. Marumakkattayam and the Aliyasantana are the two kindred systems of inheritance obtaining there in which descent is traced in the female line, both the words meaning inheritance to the sister's son. Another peculiar institution common to these systems is that of the tarwad which consists of a group of persons descended in the female line from a common ancestress.

The essential features of a tarwad are: (i) impartibility of the joint estate except by the conjoint will of all its constituent members, (ii) non-recognition of marriage as legal institution (iii) descent being traced through females, (iv) the management being vested in the senior most member, the others having only the right to maintenance, and (v) exclusion from membership of the issue of the male members of the tarwad. Thus in the case of a woman belonging to a tarwad, all her daughters and sons and all the descendants, whether male or female, of such daughters in the female line will belong to that tarwad, but the descendants, whether male or female, whether in the male or female line, of her sons cannot claim to be

(214) *Debi Baksh Singh v. Chadraban*, 32 A. 599 (P.C.)

(215) *Ramalakshmi v. Sivanatha*, 1 A. Supp. 1.

(216) *Ramaswami v. Sundaralingaswami*, 17 M. 422

(217) *Jogendra v. Nityanand*, 18 C. 151 (P.C.).

(218) *Katama Natchar v. Raja of Sivaganga*, 9 M.I.A. 539.

(219) *Northlake v. Beechamder*, 12 M.I.A. 532.

members of the tarwad. A tarwad may consist of several tavazhis. A tavazhi means the group of persons consisting of a female, her children and all her descendants in the female line²²⁰. Thus some of the female members of a tarwad may each have a tavazhi of her own. Thus when a tarwad consists of a brother and his sisters, one of the sisters with her children and all her descendants in the female line constitute a tavazhi as distinct from the tavazhi of another sister consisting of herself, her children and all her descendants in the female line. Thus in one sense a tarwad is a larger tavazhi, because even a tarwad consists of members who trace their descent through the female line from a common ancestress.

Like the Hindu coparcenary the tarwad or the tavazhi is a creature of law and cannot be created by act of parties²²¹. There cannot be a tavazhi consisting of a woman and only some of her children, and such corporate unit being unknown to Hindu Law, it is not open to a person to create such a corporate unit. Even marriage does not transplant a woman from the tarwad of her mother to the tarwad of her husband and the only means by which strangers can be made members of a tarwad is by adoption, which can be resorted to only when the tarwad is threatened with extinction and the consent of all its members is obtained²²².

In the following sections only the incidents of the Marumakkattayam system are considered, the Aliyasantana system differing from it only in some very minor particulars, these being:

(i) While under the Marumakkattayam law, the eldest male is the karnavan or manager of the tarwad, under the Aliyasantana law, the eldest member of the tarwad whether male or female, is entitled to be the manager,

(ii) While under the former system, the separate property of a male member is on his death taken by his tarwad²²³ under the latter system it goes to his nearest heir²²⁴.

(iii) While under the former system, the females generally reside in their own tarwads in the latter they usually reside in the tarwads of their husbands, and

(iv) While inter-caste marriages in the former system are common and not disapproved, such marriages in the latter system are viewed with an amount of disapprobation and censure as being mere illicit relationships, though not involving degradation or ex-communication.

Management of the tarwad—The management of a tarwad vests in the eldest male member of the tarwad except that the eldest female member may be such manager when there is a custom to that effect or there is no male member of the tarwad. Such a manager, when a male is known as the karnavan, and when a female as a karnavathi. A karnavan, who is in the position of the manager of a Mitakshara joint family, may administer the estate for the benefit of the family according to his own discretion, and is the representative of the tarwad in all transactions affecting it. His position is fiduciary in respect of the junior members, who are known as anandravans, and he has no larger right of ownership than any such member.

(220) *Mathayyan v Puthyapurayil*, 28 L.W. 491 at 493.

(221) *Thathamangalath v. Krishna*, 39 L.W. 370, *Varadran v. Secretary of State*, 11 M. 157. *Raman Menon v. Raman Menon*, 24 M. 73.

(222) *Gowdara v. Sankaran*, 32 M. 351.

(223) *Annamma v. Kaveri*, 7 M. 575.

He can incur debts and alienate tarwad properties so as to be binding upon the whole tarwad for purposes of its necessity or benefit and the position of the alienee from him is the same as that of an alienee from the manager of a Mitakshara joint family. The rights of junior members are confined to maintenance, to preventing the Karnavan from wasting or improperly alienating the tarwad property, to suing for his removal for incompetence or for bad or fraudulent management and to succeed to the karnavanship by virtue of seniority on the death or removal of the previous karnavan.

It is a matter of frequent occurrence in Malabar that members of a tarwad agree by means of karars to have the rights of the existing karnavan restricted in certain particulars either by compelling him to associate some other junior members with him in the management of the tarwad property or by putting other restrictions on his power.

Maintenance.—As an incident of a junior member's proprietary right in the property of the tarwad, there is in him or her the right to be maintained out of the tarwad income. This right cannot be denied by the Karnavan either on the ground of that member's misbehaviour or on the ground of his possession of separate property.²²⁴

Though the general rule is that a junior member is not entitled to separate maintenance the rule is subject to exceptions.²²⁵ Thus a junior member of the tarwad living away from the tarwad house for a good and proper cause is entitled to claim separate maintenance out of the tarwad estate, but the onus of proving such cause is on that member. The female members of a tarwad living away from the tarwad house with their husbands employed elsewhere are entitled to claim such separate maintenance for themselves and their children living with them, since their living away is one for proper cause. So also a junior member leaving the tarwad house to live elsewhere to practice a profession for which he has qualified himself should be taken as living outside the tarwad for a proper cause and it does not matter whether such member practises his profession in a place near the tarwad or far away from it. In addition to the above grounds which would sustain a claim for separate maintenance, there may be other grounds which, for social or economic reasons, may be considered proper.

Marriage.—Independently of any legislative enactment the law of Malabar does not recognise marriage as a legal institution, the relation being in truth not marriage, but a state of concubinage, into which the woman enters of her own free choice and is at liberty to change when and as often as she pleases. The forms of such unions usually called sambandham vary according to the custom of the locality or community, but owing to the general feeling against polyandry of which these are the modern survivals and considering the expediency of enabling persons following the Marumakkattayam or Aliyasantana law of inheritance to contract marriages which shall be recognised by Courts of law as legal marriages and to provide for the issue of such marriages, the Malabar Marriage Act (Madras Act IV of 1896) was passed allowing registration of marriages, but so far as the people following the Marumakkattayam law are concerned, the said Act has been superseded by the provisions of the Madras Marumakkattayam Act, 1933.

Adoption.—Adoption is of rare occurrence in Malabar and is purely a secular act without any religious significance, undertaken to perpetuate a tarwad which has approached

(224) *Tegan v Raghavan*, 4 M. 171.

(225) *Peru v. Appappa*, 2 M. 282.
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the brink of execution. Usually the adoption is made of a girl, for, the adoption of a boy does not subserve its purpose as his descendants cannot become members of a tarwad for purposes of perpetuating it. But there is no objection to the adoption of a male,²²⁶ or to the number of persons adopted²²⁷ or to the age of the adopter²²⁸ or adoptees. But an adoption can never be made to a member or branch of a tarwad but only to the tarwad as a whole,²²⁹ and though it is made by the karnavan of the tarwad it can be made only after consulting all the members of the tarwad²³⁰ Where the adoption is made only of a member or some of the members of another tarwad, the adoptees lose their rights in the tarwad of their birth, but if all the members of a tarwad are adopted, the adoptees do not lose the properties of that tarwad but continue to hold them as their separate properties distinct from the properties of the adoptive tarwad.²³¹

Partition.—Except when all the members of the tarwad consent there can be no partition of its properties²³² If there are minors in the tarwad they have to be properly represented by other adult members and their interests protected Otherwise on their attaining majority the partition is liable to be reopened²³³ When a partition does take place with the concurrent will of all the tarwad members²³⁴ the arrangement is not on the *stirpital* but on the *per capita* basis. Now under the Madras Marumakkattayam Act of 1933 which however, applies only to persons governed by Marumakkattayam law, it is not necessary that all the members of the tarwad should consent for a valid partition Any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad provided that if there is an ancestress common to that tavazhi and any other tavazhi of the tarwad her consent is obtained for such separation.

Inheritance.—Religious efficacy not being a ground of preference in succession among the people governed by the Marumakkattayam law, the only test that ought to be applied to determine the preferential heir must be the test of propinquity or nearness of blood But group succession being the rule among these people, the question arises whether when a person having separate property dies, his property should be taken by the tarwad of which he was a member or by the tavazhi to which he belonged Applying the test of propinquity, it is the tavazhi that must succeed and not the whole tarwad. But while the separate property of a female member would be taken by her tavazhi,²³⁵ that of a male member would be taken by the tarwad,²³⁶ subject to the exception that if the property of the male member has

(226) *Subramanyam v. Parmeswaran*, 11 M. 116

(227) Moore's Malabar Law p 33; S.A. No 19 of 1874, *Kunja v. Aiyappa*, 9 Tr. L.R. 100.

(228) *Vahappa v. Paru*, 9 M.L.J. 196.

(229) *Raman v. Raman*, 24 M 73; 10 M.L.J. 245; *Chandu v. Subba*, 13 M. 209.

(230) *Pelagudhan v. Ramaswami*, 7 Tr. L.R. 66

(231) *Velthakkal v. Kalappa*, 31 M.L.J. 879.

(232) *Ibid*, *Narayana v. Achuthan*, 42 M 292.

(233) *Ranga v. Unnikutti*, 24 M 274.

(234) *Krishnan v. Damodaran*, 38 M. 48.

(235) *Rangan v. Madhavan*. 1927 M. 244, *Gopandan v. Sankaran*, 32 M 351.

been acquired with the help of the tavazhi property, that property would be taken only by the tavazhi.²³⁶ When there are several tavazhis, they having separated from one another, on the extinction of a tavazhi by the death of its last member, the tavazhi from which the extinct tavazhi separated last succeeds to its properties in preference to others though more nearly connected with it by blood.²³⁷ (For changes effected in the Marumakkattayam law see the Marumakkattayam Act of 1933 printed elsewhere at the end of the Chapter on The Law of the Malabar Tarwad.

(236) *Koma v. Ittigtha*, 10 M L.J. 57.

(237) *Copale v. Raghavan*, 21 L.W. 215: 1925 M. 460.

THE HINDU SUCCESSION ACT (XXX OF 1956)

*An Act to amend and codify the law relating to intestate succession
among Hindus*

[17th June, 1956]

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title and extent—(1) This Act may be called the Hindu Succession Act 1956

(2) It extends to the whole of India except the State of Jammu and Kashmir.

Preamble

1. History of the enactment.

3. Scope of the enactment

2. Commencement of the Act

4. Changes effected by the Act

1. History of the enactment—The Hindu Succession Act (XXX of 1956) is one in the series of enactments purporting to change the personal law of the Hindus that had been originally promulgated by the seers of old. The fact that the ancient law which had been governing the Hindus now for centuries had remained almost unimpaired except for a few customs here and there which had made inroads into its incidents, speaks volumes for the fundamental vitality and elasticity of the original law, the substance of which had been observed through the ages, though on minor matters, there had been modifications thereof to suit the changing needs of time and exigencies of local conditions. It is remarkable that through all the centuries that rolled by, till we come to the latter half of the nineteenth century, there had been practically no serious attempt to tinker with the law laid down by Manu and Yajñavalkya. But the modern conditions generated by the impact of western culture and civilization, especially during the latter half of the nineteenth century and commencing virtually from the Proclamation of Queen Victoria in 1857, necessitated a re-orientation of the outlook of the East in respect of the future progress and development of the nation, and the idea was slowly but steadily gaining ground that everything old should be put to the test of reason and modified, mended or even ended if there is not the approbation of the educated intelligentsia of the country. The urge for such re-orientation had been created even earlier by leaders of the community like Raja Ram Mohan Roy and others.

The present enactment is the culmination of this movement for changing the ancient law of the Hindus for a more equitable, consistent and coherent system of jurisprudence. The changes effected by this statute in the personal law of the the Hindus are far-reaching and fundamental,

2. Commencement of the Act—The Bill was passed into law and received the assent of the President of the Indian Union on the 17th June, 1956. On that day it had come into force under the provisions of section 5 of the General Clauses Act (Central).

3. Scope of the enactment.—The preamble shows that this Act is, "An Act to amend and codify the law relating to intestate succession among Hindus". Being a consolidating

statute it is to be interpreted as containing in complete form the whole body of law on the subject it deals with, including testamentary succession among Hindus uninfluenced by considerations derived from the previous state of law. It is to be read as a self-contained Code and complete enactment with respect to matters dealt with by it.¹ To the extent, therefore that there is a provision in this Act with reference to any matter, relating to succession that provision must apply whatever the previous law might have been. At the same time it should not be forgotten that an amendment which this enactment is should not be so construed as to affect and alter any incident which does not fall either expressly by necessary implication within the ambit of the enacted language, for, it is axiomatic in the interpretation of an amending statute that it should be construed strictly as rigorously confined to the subject-matter of its express provisions. The state of the law at the time the amending Act was passed and the object that the Legislature had in introducing the new provision can throw light upon its interpretation. This is a permissible matter to look into for the purpose of construing a statute provided that the Court does not strain the language of the statute unduly by attempting to bring it within a supposed intention, *Mohammed Hussain v Jamini*.² When a law or a particular branch of it is codified, that code is to be taken as an exhaustive treatise on the subject with which it deals and the law is to be looked for within the four corners of that Code. *Neslaorem v Narayana Reddi*,³ *Krishnaswami v Chengalvarayan*,⁴ *Thikaram v Ganesh Mal*,⁵ and not elsewhere. In the interpretation of an amending and codifying Act like this regard should be had to the clear language of the Act. *Chinnappa Goundar v Valliammal*.⁶

The Act has no retrospective operation.⁷ It applies to agricultural lands also.⁸ In view of the provisions of Section 21-A inserted in the Special Marriage Act, 1954 by the Marriage Laws (Amendment) Act, (LXVII of 1976), the provisions of the Hindu Succession Act will apply to cases where the marriage is solemnised under the Special Marriage Act, 1954 of any person who professes the Hindu, Buddhist, Sikh or Jain religion with a person who professes the Hindu, Buddhist, Sikh or Jain religion.

4 Changes effected by the Act—The changes effected by this Act on the law as it stood prior to its enactment are far-reaching and fundamental. One essential principle that run through the estate inherited by a female heir, namely, that she took only a limited estate has been abolished completely and whatever property is inherited by a woman whether it be from a male or from a female by whatever school she is governed, is now taken by her as an absolute owner. Another important change introduced by the Act is to let in numerous females as heirs to the property. In addition to the female heirs either let in by the original Smritikars and the commentators or let in by the Hindu Law of Inheritance Amendment Act (II of 1929) or by the Hindu Women's Rights to Property Act of 1937, numerous other female heirs have been newly added to the list. Their position in the line of heirs has been considerably,

(1) *Jwala Narasimha Reddy v Narayana Reddy*, (1978) 1 An. L.T. 407

(2) 1938 Cal. 97 1 L.R. (1938) 1 Cal. 607.

(3) 1 L.R. 43 Mad. 94-1920 Mad. 640

(4) 1 L.R. 47 Mad. 171 1924 Mad. 114

(5) 1944 Sind. 73

(6) 81 L.W. 424 1969 Mad. 187

(7) *Madhoo Kumar v Sabi Bewa*, 1973 Pat. 160 Cf. *Dadga v Raghunath*, 1979 Bom. 176 [Succession opens at time of death].

(8) *Nidha Sunn v. Sacha Dabya*, 1973 (1) C.W.R. 746; 39 Cut. L.T. 646.

advanced and in the case of widow, mother and daughter their position is elevated to that of the son. A still further innovation under the new Act is the principle of simultaneous succession of heirs of different relationships, and some of the female heirs taking together along with the male heirs, as for instance, in the case of daughters, widows, mother and sons taking the property simultaneously. It is worthy of note that amongst what one may call the first or the primary heirs, there are twelve of them, of whom eight are females. The general impression, therefore, that is formed in the mind of anybody even by a cursory glance through the provisions of the Succession Act is one of an inveterate obsession on the part of the Legislature to improve the lot of women from what it was prior to the enactment and bring up their position as far as possible in line with and equal to that of men and even better than the position occupied by the female heirs under the Mohamedan law. One cannot resist an impression that there has been a drive on the part of the Legislature to align the incidents of Hindu succession on the principles of Mohamedan Law, and, if possible, so far as the females are concerned, to give them better status than under that law. The rule of spiritual benefit which governed the determination of the respective ranks amongst the heirs in the old Hindu Law of succession has been given the go-by and the division of Sapindas, Samanodhakas and Bandhus is no longer operative. The rank of the widow which came only after the son has been pushed up so as to be on a par with the son himself. The principle of survivorship which distinguished the joint family system has been allowed to survive in an attenuated form facing extinction in the near future. The preference shown to the female heirs in the case of succession to women's property has been done away with as a counter-balancing measure to the abolition of the preference accorded to the male heirs as against the female heirs in the matter of succession to males.

The disability that a widow succeeding to her husband's property faced in case of her re-marriage or conversion has been abolished, and the disqualification of a widow to succeed to her husband's property on account of her unchastity at the time of his death is also gone. The right by birth which is an essential incident of coparcenary property also disappears with the disappearance of the coparcenary itself, since no longer can coparcenary be predicated in the case of any inherited property owned by a plurality of different heirs. A coparcener can now make a will, a privilege denied to him formerly, even in respect of coparcenary property, though the disability to make a gift in the case of his interest in the coparcenary property for reasons which cannot be easily seen has still been retained. The right of an illegitimate son in the case of Sudras to inherit the property of the putative father is no longer there, though his right to succeed to his mother is preserved. The theory of representation and stirpital succession survives only in a truncated form and can be said to be practically ruled out under the new dispensation. The difference between an unprovided daughter and a provided daughter and between a married daughter and an unmarried daughter in the matter of their succession to the property of their father resulting in the preference shown to the unmarried as against the married and to the unprovided as against the provided for daughter has also been abolished. The very salutary principle adverted to by Mr Justice Varadachariar in *Narayanaswamy v. Gopalaswami*⁹ viz that no parent who gives property to his or her daughter, even though absolutely, likes that property to go to the son-in-law's heirs if the daughter dies issueless, has been embodied in the order of succession framed for the stridhanam inherited by a woman from her parents,

(9) 1938 Mad 6.

though it is difficult to see why this principle has not been given full scope even as regards property received by a woman by gift from her parents

The above are only some of the broad lines on which changes have been effected under the Act.

Section 1—Synopsis.

1. Name of the Act

2. Territorial extent.

1. Name of the Act.—The Act is called "The Hindu Succession Act, 1956," and though the Act indicates that its object is to govern persons who are Hindus by religion, it will be found that by reason of the definition of the expression "Hindu" in section 2 (3) as including a person who though not a Hindu by religion is nevertheless a person to whom this Act applies by virtue of the provisions contained in section 2, it governs also certain persons who are not Hindus in the strict sense of the term. Who those persons are, have to be determined with reference to the scope, the ambit and the reach of the application section, viz section 4. A person may be a non-Hindu, being a member of any scheduled tribe within the meaning of clause (25) of Article 366 of the Constitution, to whom by notification of the Central Government in the Official Gazette this Act is held to apply. So also a person may be a non-Hindu but his parents may be Hindus in religion. Their child though not professing the Hindu religion will still be a Hindu by reason of the provision in Explanation (a) to section 2 (1). While the Act can thus be made to apply to a non-Hindu, that non-Hindu should not, however, be a Mussalman, Christian, Parsi or Jew by religion, because the construction to the contrary would be repugnant to the provisions of section 2 (1) (c), which says that the Act applies to any person who is not a Mussalman, Christian Parsi or Jew by religion. In other words, persons who do not belong to the Mussalman, Christian, Parsi or Jewish religion may be governed by this Act if they come within the definition of a 'Hindu' within the meaning of section 2 even though they do not profess the Hindu religion. The reason for this distinction between a person who is a non-Hindu by religion and a person who is a Mussalman, Christian, Parsi or Jew by religion is based upon the circumstance that while in the case of a Mussalman, Christian, Parsi or Jew there are special and specific laws, either statutory or otherwise, governing them in India, as regards the other non-Hindus, the only body of laws that can possibly be looked to for governing them will be the Hindu Law, as modified by this statute. In other words, if it is not possible to postulate that a particular person is a Hindu by religion and at the same time it is clear that that person is not a Mussalman, Christian Parsi or Jew, he may be governed by this Act as a Hindu. The Act, however, insists that the person sought to be governed by it should not be an adherent of any of the four religions mentioned in the section, viz, the Mussalman, Christian, Parsi or Jewish religions.

2 Territorial extent.—Clause (2) of section 1 extends the Act to the whole of India except the State of Jammu and Kashmir. The old rule of Hindu Law that a Hindu would carry his personal law with him wherever he went, whether in India or outside India, cannot apply in respect of incidents enacted upon in this statute. No doubt, to the extent the old Hindu Law has not been trenchanted upon and altered by the provisions of this Act, the principle of the personal law of the Hindus following him as his shadow would still govern. Even there, according to the well-known rules of international law, the personal law cannot operate with reference to rights relating to immovable property. Thus, if a Hindu is residing in England or in America, he will be governed, no doubt, by his personal law regarding his rights touching his personality. But with regard to immovable properties really situate within

the foreign country, the law that governs is the law of that foreign country. A question may arise whether even in respect of personality after the enactment of the Hindu Succession Act, a Hindu residing in a foreign country will be governed by this Act or by the Hindu law as it obtained prior to the enactment of this statute. Having regard to sub-section (2) of section 1 it is clear that he is not governed by this enactment because he is outside India and it is to India alone that this Act applies. Therefore, the law that must govern his personality must be the personal law of the Hindu as it obtained prior to this Act coming into force. A further problem may be posed with reference to the territorial extent. Supposing a Hindu residing in India and governed by this enactment goes to a foreign country after the Act has come into force, with reference to such person, his personality will be governed by this Act because he is governed by this Act wherever he may be, except as regards rights to immovable property. Even as regards the immovable property, a distinction has to be made between immovable property situate in India and immovable property situate outside India. As regards immovable property situate in India this Act will apply. As regards such property situate outside India, the *lex loci* or the law of the country in which such immovable property happens to be situate must govern. Thus, it can be said that the territorial extent of this Act is confined to all the immovable properties situate in India and belonging to a person governed by this Act and all movable property situate inside or outside India belonging to a person who is governed by this Act. Such a person may be residing in India, or he may be residing outside. If such a person is residing in India no difficulty arises, if he resides outside India, difficult questions of International Law will arise. It may happen that the law of the foreign country in which he resides may itself apply the Indian law to such resident even as regards his immovable properties situate in that foreign country.

2 Application of Act—(1) This Act applies—

- (a) to any person, who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj
- (b) to any person who is a Buddhist, Jaina or Sikh by religion, and
- (c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed

Explanation—The following persons are Hindus, Buddhists, Jains or Sikhs by religion, as the case may be—

- (a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion.
- (b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged,
- (c) any person who is a convert or reconvert to the Hindu, Buddhist, Jaina or Sikh religion

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

2-A. Notwithstanding anything contained in sub-section (1) nothing contained in this Act shall apply to the Renoncants of the Union Territory of Pondicherry.

(3) The expression "Hindu" in any portion of this Act shall be construed as it included a person who, though not a Hindu by religion, is nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

Section 2—Synopsis

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| 1. Persons governed by the Act. | 6. Non-Hindus to whom the Act applies. |
| 2. Hindus by religion | 7. Hindus residing in foreign country. |
| 3. Hindu dissenters | 8. Legitimate children. |
| 4. Persons who are not Mussalms, Christians, Parsis or Jews | 9. Illegitimate children. |
| 5. Scheduled Tribes. | 10. Converts to Hinduism. |
| | 11. Scheduled Tribes. |

1. **Persons governed by the Act.**—Section 2 simply provides the class of persons whose properties will devolve according to the Hindu Succession Act. It is only the property of those persons mentioned in Section 2 that will be governed according to the provision of the Act. The section has nothing to do with the heirs under the Act. It does not lay down as to who are the disqualified heirs.¹⁰ The section mentions five categories of such persons: (i) Persons who are Hindus by religion, including *Virashawites*, *Langayats*, *Brahms*, *Prarthawites* and *Aryasamajists*; (ii) persons who are *Buddhists*, *Jains* or *Sikhs* by religion; (iii) persons who are not Mussalms, Christians, Parsis or Jews by religion; (iv) persons who are not Hindus by religion and who are also not Mussalms, Christians, Parsis or Jews; and (v) persons who belong to Scheduled Tribes.

The *Explanation* to sub-section (1) of section 2 amplifies the scope of the application of sub-section (1) by bringing under the category of Hindus, Buddhists, Jains or Sikhs by religion, the children of these persons and the converts or reconverts to the Hindu, Buddhist, Jain or Sikh religion. The object of the comprehensive scope regarding the application of the Act seems to be to bring within its fold everyone in India who is not a Mussalman, Christian, Parsi or Jew by religion. No doubt, in the case of one who is neither a Hindu nor a Mussalman, Christian, Parsi or Jew, it may be argued that the general enactment regarding succession, viz., the Indian Succession Act XXXIX of 1925 should apply, but having regard to sub-section (3) of section 2 read with the previous sub-sections and clauses of section 2, it is obvious that the intentment of the legislature is that excepting Mussalms who have a law of their own, and Christians, Parsis and Jews who are governed by the Indian Succession Act, all others whether they profess Hinduism or not should be governed by the Hindu Succession Act, hammered out of principles of essential justice and equity. Hindus marrying under the Special Marriage Act of 1954 will be governed by the Indian Succession Act. This provision will not however apply where both the parties marrying under the Special Marriage Act profess the Hindu, Buddhist, Sikh or Jain religion by virtue of the provisions of Section 21-A inserted in the Special Marriage Act by the Marriage Laws (Amendment) Act, 1976, Section 22. In such a case the parties will be governed by the Hindu Succession Act only.

2. **Hindus by religion.**—Clause (a) of section 2 (1) applies the Act to all persons who are Hindus by religion in any of its forms or developments, including *Virashawites*, *Langayats*, *Brahms*, *Prarthawites* and *Aryasamajists*. The intention of Parliament is that whatever be the

(10) *Ashoka Mehta v. Raymond S. Mehta*, 1976 Cal. 272, 273.

ritual or dogma or philosophy or creed that may be adopted by persons who profess to be Hindus, whether they subscribe to all or only some of the theological doctrines of the Hindu faith, they should be governed by this enactment. A *Virashakta* is a Hindu who pays homage only to Shiva and emphasizes the God-head of Shiva as the paramount deity in the Hindu Pantheon. There is very little difference between a *Virashakta* and *Lingayat*, the latter's aversion to the God-head of Vishnu, not being so pronounced as that of the former. The sects called the *Brahmins*, *Prasthanis* and *Aryasamajists* have evolved simplified forms of worship devoid of technical formalities which have obscured the essential and fundamental concept of Hindu theology, *viz.*, faith in God without elaboration or ceremonial worship.

Clause (a) though it particularises some of the sects or sectarians in the Hindu fold does not exhaust all the forms or developments. There may be others similarly situate, and so long as they do not disown their character as Hindus or their faith in Hindu divinity, whatever the forms they may observe and in whichever period they might have developed would all come under the category of Hindus by religion in clause (a) of section 2 (1).

3 Hindu dissenters.—Clause (b) of section 2 (1) applies the Act to Buddhists, Jains and Sikhs by religion. The difference between clause (a) and clause (b) is this: while the persons coming under clause (a) do not disown Hinduism as such but only adopt a particular form or development of that religion and continue to call themselves Hindus, the persons in clause (b), *viz.*, Buddhists, Jains and Sikhs do not call themselves Hindus. Many doctrines of Hindus they disown and even resent. For instance, the Jains and the Buddhists hate the sacrifices which are inculcated by Hinduism as essential for salvation. No doubt, originally before Buddhism and Jainism were born, the ancestors of all their present adherents in India belonged to one religion which for convenience can compendiously be called Hinduism. There might have been different philosophies and modes of propitiation of the Gods. Emphasis might have been laid more on certain aspects of spiritual life by certain sections of the people than on others. Some of the Gods of the Hindu Pantheon might have been more favoured by a certain community of the people in a particular part of the country or tract. But when Buddhism or Jainism was born, a separate Code of religion, of beliefs, practices and objectives different from those prevailing hitherto, had been formulated by the respective founders of those religions, and their followers went to the extent of claiming themselves even as hostile to the Hindu faith. The result was a series of persecutions of the Hindus by the Jains and the Buddhists and subsequently equally sanguinary persecutions of the Buddhists and Jains by the Hindus in retaliation. In course of time, history records the virtual extermination of the Buddhists from the Indian soil and the driving out of the Jains to the obscure corners of the country by the overwhelming might and reformed philosophy of the Hindus who gained strength from about the ninth century onwards.

The hostility between the Hindus, Buddhists and Jains gradually decreased when the Hindus gained complete ascendancy, and it was turned into toleration and sympathy for the Jains during the Muhammadan period when they had to contend against the common enemy. One finds in later centuries a free and friendly intercourse between the Buddhists and Jains on the one side, and Hindus on the other, in the face of Muhammadan persecution, when the Sikhs also joined them in their common cause.

The Sikhs are 'disciples' originally of a pious sect of the Hindus following the precepts of their first Guru or Prophet, named *Nanak*, who lived from A.D. 1469-1539. His teachings insisted on the unity of God, the futility of forms of worship and the unreality of caste distinctions.

tions. *Har Govind*, the sixth head of the Sikhs transformed the sect of quiet mystics into a fierce military order or brotherhood, and *Guru Gobind*, who was the tenth and last Guru was the real founder of the Sikh military power which he organised to oppose the Muhammadans. The incentive to solidarity amongst people other than the Muhammadans, which received encouragement by the alliance of the Sikhs against the Muhammadan domination, received a further stimulus when the British were conquering the country and establishing their sway. In the Indian Mutiny of 1857 their common cause was cemented in the sacrifice of fire and blood, and today by reason of the Jains, the Hindus and the Sikhs having lived and worked together for the liberation of the country from foreign domination, the common origin of all these sects is recalled and cherished. Hence, however vital and fundamental the philosophical differences may be between Hinduism on the one side, and Buddhism, Jainism or Sikhism on the other, there is a feeling that they all belong to the same stock and have come out of the same origin and should be governed by the same law. Hence is clause (d) of section 2 (1) worded as it is, making this Act applicable to the Buddhists, Jains and Sikhs as well as to the Hindus.

4. Persons who are not Muslims, Christians, Parsis or Jews—Clause (e) of section 2 (1) enacts a presumption in favour of the applicability of the Act to all persons who are not Muslims, Christians, Parsis or Jews. This presumption is, however, rebuttable by proof that the person in question, though not a Muslim, Christian, Parsi or Jew by religion, is not governed by Hindu Law or by any custom or usage in pursuance of that law in respect of any of the matters dealt with herein if this Act had not been passed. This means that a person need not be a Hindu and need not be a Muslim, Christian, Parsi or Jew. He may have no religion at all, as for instance, an atheist. He may believe in a conglomeration of faiths. It may be a crude or refined mixture of the worst or the best respectively of two or more religions. Still, since there is no well-defined law governing the matters of succession in his case as in the case of Muslims, Christians, Parsis or Jews, Parliament thought that it would be just and proper that he should be held to be governed by this enactment. It is no doubt open to him to show that Hindu Law had never applied to him before the enactment and this Act should not apply to him after the enactment. In order to show that such a person is not governed by this Act, it is not enough for him to show that he was never governed by the Hindu Law. He must go further and show that he was not governed even by any custom or usage as part of the Hindu Law. It is a matter of common knowledge and experience that many Hindus are observing numerous customs which are not quite in conformity with the injunctions of the original Sanskrit texts. These customs have come to be in vogue owing to various local conditions and exigencies and have been adopted by the people of the particular locality or community as part of the Hindu Law. There are also other communities who do not own even a theoretical allegiance to the Hindu faith and are governed by customs which have nothing to do with Hindu Law or with the customs which are followed as part of that Law. These people can claim that, though they are not Muslims, Christians, Parsis or Jews they are not to be governed by the Hindu Law and after the enactment of this Act since they had nothing to do with the Hindu Law as such. Which of the communities or classes of persons will fall under this category or exception to communities governed by Hindu Law must be decided with reference to the particular community which pleads that exception.

5. Scheduled Tribes.—Sub-Section (2) of Section 2 provides that notwithstanding anything contained in the first sub-section nothing in the Act shall apply to the members of the Scheduled Tribes falling within the meaning of clause 25 of Article 366 of the Constitution.

But the Central Government by notification in the Official Gazette can direct that the Act shall apply to them also.¹¹ Failing any such notification their old law will continue to govern. Members of the Boro Borokachari, a scheduled tribe of Assam were thus held to be governed by the Bengal school of Hindu law and not by the Hindu Succession Act.¹² There is nothing said here of any Scheduled Tribe being previously governed by Hindu Law or following the Hindu religion. There may be a Scheduled Tribe which may have a religion of its own which is not one of the well-known religions like those of the Hindus, Muslims, Christians, Parsis or Jews or there may be a Scheduled Tribe which may be following the Christian or Muslim religion. Or there may be a Scheduled Tribe which is governed by the Hindu Law itself. In all these cases the second sub-section provides that the Act shall not apply unless otherwise directed by the Central Government. When it comes to the question of applying this enactment by a notification to a particular Scheduled Tribe, the Central Government will certainly consider what is the religion to which the religion of that tribe bears the closest affinity or analogy. If the religion of the particular tribe partakes of, at any rate, some of the incidents of the Hindu religion and customs and practices, the Central Government may be well-advised in directing the application of this enactment to that tribe also. But if that tribe has none of the incidents of the Hindus and is governed purely by customary law, then, that customary law will continue to govern that tribe. In other cases the applicability of the Indian Succession Act as the general law of the country may well be invoked.

A certain amount of conflict is apparent between the operation of the Indian Succession Act and the operation of the Hindu Succession Act in respect of intestacy regarding persons who are non-Hindus and who at the same time do not belong to the Christian, Muslim, Parsi or Jewish religion. S 29 (2) of the Indian Succession Act provides that the provisions of Part 5 of that Act dealing with Intestate Succession shall constitute the Law of India in all cases of intestacy. Sub-section (1) of section 29 says that this part shall not apply to any intestacy with reference to any property of Hindus, Muslims, Buddhists, Sikhs or Jains. In other words, if a person is not a Hindu, Muslim, Buddhist, Sikh or Jaina, the law of Intestate Succession with reference to his property is the law laid down in Part 5 of the Indian Succession Act. But the Hindu Succession Act in section 2 (2) says that the Central Government can direct by notification in Official Gazette the application of the Hindu Succession Act to a Scheduled Tribe which does not belong to the Hindu, Muslim, Buddhist, Sikh or Jaina religion. The proper construction of both these provisions is probably this. The Scheduled Tribe will be governed by the Hindu Succession Act if the Central Government directs by notification in the Official Gazette that it should so apply. If there is no such direction and the Scheduled Tribe cannot be said to belong to Hindu, Muslim, Buddhist, Sikh or Jaina religion, it will be governed by the Indian Succession Act.

6. Non-Hindu to whom the Act applies.—Sub-section (3) of Section 2 makes the expression 'Hindu' include a person who though not a Hindu by religion is nevertheless a person to whom this Act applies by virtue of the provisions contained in this section. This means that a person though not a Hindu by religion can be governed by the Hindu Succession Act. But if he is a Muslim, Christian, Parsi or Jew by religion, he will be outside the operation of this enactment by reason of the provision in Section 2 (1) (e). A person may not be a Hindu and may not also belong to the Muslim, Christian, Parsi or Jewish religion, for instance, he may be an atheist altogether or he may have a religion of his own which is

(11) *Dasratha Naik v. Gurg Bawa*, 1971 (1) C.W.R. 339 [Bathudis are members of Scheduled Tribes].

(12) *Satish Chandra v. Bagram*, 1973 Gauhati 76.

none of the above religions. In such a case he will be governed by the Hindu Succession Act. Here again, as was observed in considering the application of the Act to the Scheduled Tribes, the conflict between the operation of the Indian Succession Act and the operation of the Hindu Succession Act is apparent. Under the Indian Succession Act, if a person is not a Hindu, Buddhist, Jaina or Sikh by religion and is not a Mohammedan, the Indian Succession Act will apply to Intestate Succession, be he a Christian, Jew, Parsi or any other. Under sub-section 3 of this section he will be governed by this Act and considered as a Hindu if he is not a Muslim, Christian, Jew or Parsi and he is a Hindu by virtue of the provisions contained in Section 2. The provisions which will make a person not a Hindu by religion a Hindu for the purpose of this Act are to be found in Section 2 (1), *Explanations (a)* and *(b)* and Section 2 (2). Under Section 2 (1) (c) we have already considered that a person if he is not a Muslim, Christian, Parsi or Jaina by religion may by presumption be governed as a Hindu by this Act, till this presumption is rebutted by proof indicated in that clause. The scope of *Explanations (a)* and *(b)* to Section 2 (1) may also take in a non-Hindu by religion. Under *Explanation (a)*, for instance, the child may be a non-Hindu by religion in the sense that in fact and indeed the child either does not profess any religion at all or professes a religion which is not Hinduism, but still from the fact that its parents are Hindus it will be governed by this Act in the same way as a Hindu under *Explanation (a)*. So also in respect of a child of which one of the parents is a Hindu and the child is brought up as a member of the tribe, community, group or family to which such parent belongs, it will be considered to be governed by this Act whatever may be the religion it professes. This is under *Explanation (b)*.

7 Hindu residing in foreign country.—Section 1 (a) extends the operation of the Act only to India except the State of Jammu and Kashmir. So the Act cannot apply outside the bounds of the Indian Union. A case may arise of a person domiciled and residing in a foreign country and governed by the Hindu Law prior to the enactment of this legislation. Does this Act govern such a person? It cannot, because, he is living outside the Indian Union. But he will be governed by the Hindu Law, that being the personal law which he carried with him when he went to the foreign country. But if he returns to India and becomes domiciled in the Indian Union this Act will govern him. So also, if a person who resides in India at the time of the enactment of this Act and if governed by it, subsequently betakes himself to a foreign country, this law will govern him unless there is a change of domicile and he adopts the domicile of the foreign country. The law of domicile may be summarised as follows:

- (1) A person domiciled in a country is governed by the law of that country.
- (2) If he goes to another country, the presumption is he is still governed by his original domicile and by the law of that domicile.
- (3) If he gives up the original domicile and acquires the domicile of the new country, then the law of the original domicile will cease to operate and he will be governed by the law of the new domicile.
- (4) The onus of proving such a change of domicile from the original to the acquired is heavy upon him who pleads it.
- (5) The domicile of a person governs not only him but also his wife and his minor children, subject to the exception that if he dies or there is a divorce it is open to his wife to

change the domicile to some other, and also subject to the condition that the domicile of the legitimate minor child which is that of its father is liable to be changed and given up in favour of another on the child attaining majority and becoming *sui juris*.

8. Legitimate children—Section 2 (1), *Explanation (a)*, provides that any child legitimate or illegitimate both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion is a Hindu, governed by this Act. It expressly provides for the conferment of the status of a Hindu on a person even though such status is doubtful when the personal law of the parties is invoked. Thus if a Hindu father who had contracted a marriage with a Christian woman inducts the child into the Hindu family and brings him up as such, then the statute invests him with the status of a Hindu and recognises him as a Hindu¹⁸. The legitimacy of a child is to be postulated in the case of a child born during wedlock between two persons of the Hindu community. Who can lawfully marry each other and when the children of a marriage are to be considered legitimate are questions to be answered with reference to the Hindu Marriage Act. One thing that is clear under this provision is that both the parents must be Hindus to whatever sects or sub-sects, castes, or sub-castes, they may belong. It is possible to have a valid marriage between a Brahmin and a Sudra, between a Hindu and a Buddhist or Jain or Sikh or *vice versa*, because all these are within the definition of Hindu given in Section 2 for the purpose of this enactment. A child, therefore, of a marriage between two persons belonging to the said communities is to be governed by this Act. It is no doubt open to such a child after attaining majority to give up the religion of its parents and embrace some other religion such as Islam or Christianity. But so long as he is a minor, he will be governed by this Act. The reason why the *Explanation (a)* of Section 2 (1) provides for the child of Hindu parents being governed by Hindu Law and not by any other law is that it is impossible for the child so long as it has not crossed the boundary of minority to be governed by any religion other than that of its parents, whatever be the maturity of the child and its capacity to understand and appreciate the doctrines and precepts of the various religions and its partiality for this religion or that.

If the child is a legitimate child born to parents, one of whom alone is a Hindu by religion, then *Explanation (b)* to Section 2 (1) provides that he will be considered as a Hindu for the purpose of this enactment only if he is brought up by a member of the tribe, community, group or family to which such parent "*belongs or belonged*". Thus *Explanation (b)* is rather clumsily worded but there can be no doubt about its meaning. It is possible on the wording of this clause to contend that when a child, one of whose parents is a Christian or Mohamadan, but the other parent is a Hindu, is brought up as a member of a Hindu community to which its Hindu parent belongs, then it will be considered as a Hindu only, governed by this Act. Supposing the Hindu parent, during the minority of the child changes his religion, does that change affect the religion of the child also? Under the ordinary law of parent and child, the child follows the religion of the father if it is legitimate and that of the mother if it is illegitimate, irrespective of the question whether it is brought up in this religion or that. And under the same law, a change of religion by the father in the case of legitimate child and of the mother in the case of illegitimate child, would effect a corresponding change in the religion of the child also. But this *Explanation* does away with both these incidents and lays down a different test altogether for the purpose of this Act, namely, what is the religion of the community in which it is brought up, the community to which one of its parents belongs or belonged?

(13) *Sridharan v Commissioner of Wealth-tax*, (1970) 2 M L J 334 1970 Mad 249

If one of its parents is a Hindu and it is brought up in the Hindu community to which he or she belonged, then it will be considered only as a Hindu even though subsequently that parent may change his or her religion.

The words "belongs or belonged" must have been deliberately used for the purpose of indicating that whatever be the religion of the parent at the time the question arises, it is the Hindu religion of the community in which the child is brought up that should be considered irrespective of whether the original Hindu parent continues to be Hindu or not. For instance, a child may be born to a Hindu mother kept by a Christian father and the child may be brought up as a Hindu by the Hindu community to which the mother belongs. If subsequently the mother becomes a convert to Christianity but the child is still brought up as a Hindu in the Hindu community, the child will be considered to be Hindu though neither of its parents at the time the question arises is a Hindu. That is the reason why the word "belonged" is used in addition to the word "belongs". The use of the past tense "belonged" is also explicable on the footing that the Hindu parent has died when the question of succession with reference to that child comes up for adjudication. So, the net result is that if the Hindu parent still continues to be a Hindu and the child is brought up as a Hindu it will be considered as a Hindu even though the other parent may be a non-Hindu. So also if the child is brought up as a Hindu even though his Hindu parent has died or has ceased to be a Hindu and the other parent is a non-Hindu, the child will be considered as a Hindu for the purpose of this Act.

A question may arise when there is a conflict between the claim of the Hindu community to retain the Hindu faith for the child and the claim of the original Hindu parent who wants to change that faith of the child because he has become a renegade and an apostate from Hinduism and has become converted to some other faith. Should the normal paramount right of the parent to the custody of the child and the regulation of its religion be given the go-by in the interest of the Hindu community which undoubtedly this provision wants to safeguard? In other words, does the Legislature postulate that a Hindu child should not have its religion changed merely because the parent desires such a change? The answer appears to be in the negative. The real test is the welfare of minor.

9 Illegitimate children.—The principles discussed in the previous heading under 'Legitimate Children' apply also in the case of illegitimate children. They are treated alike in the *Explanations* (a) and (b) of Section 2 (1). A child may be illegitimate either because it is born outside wedlock or because the marriage is invalid or because it is the product of relations between a Hindu and a non-Hindu. If both the parents are Hindus, the case falls under *Explanation* (a). If one of them is a Hindu and the other a non-Hindu, the case falls under *Explanation* (b). In the case of an illegitimate child the presumption is that it is governed by the religion and law of the mother, but *Explanation* (b) says that even if the mother of an illegitimate child is a non-Hindu, the child may still be a Hindu by reason of its father being a Hindu and the child being brought up as a Hindu by the community to which the father belongs. Again, the well-known principle that the religion and law of the illegitimate child follow the religion and law of the mother would still apply when the mother is a Hindu and the child will be considered as a Hindu. *Explanation* (b) has no application when neither of the parents is a Hindu even though the child may be brought up as a Hindu. Let us take a case of a foundling being brought up as a Hindu by persons who come upon that child and subsequently rear it in their own faith as a Hindu. If it turns out and is discovered ultimately that both the parents of the child were

non-Hindus, the child cannot be considered as a Hindu for the purposes of this Act and *Explanation (b)* will not apply to such a case.

10. Converts to Hinduism.—The Act applies also to persons who were not originally Hindus but who became converted to Hindu religion. This religion embraces the Hindu, Buddhist, Jaina or Sikh religion. The Act, applies also to persons who were originally Hindus but who, became converted to some other religion and subsequently reverted to their original faith, namely, Hinduism. The law does not prescribe any particular forms or ceremonies for conversion or reconversion to Hindu faith. The decision whether there has been such a conversion is to be arrived at on a consideration of the ceremonial which is adopted and recognised by the community into which the conversion has been made. There is no doubt the need for giving up the non-Hindu religion to which the convert previously belonged together with a declaration of belief in the Hindu religion, but when that declaration is to be given or how it is to be implemented and what are the words or methods which would be sufficient or necessary for holding that the conversion has taken place would, as already said, depend on the usages or customs of the community in question. If the consciousness of the Hindu community into the fold of which the convert is ushered is that the convert is a member of that community and is looked upon as a Hindu by that community, then he will be a convert within the meaning of section 2 (1) (c) attracting the application of this Act. The ceremonies and forms of conversion may vary from place to place and from community to community and may be moulded and coloured by the community being a Hindu, Buddhist, Jaina or Sikh, but since all these people come within the comprehensive definition of a Hindu for the purpose of this Act, such varieties in the forms and ceremonies of conversion are unessential and ought not to be allowed to render the conversion invalid or incomplete.

The question whether a convert to Hinduism should be classified as belonging to a particular caste however relevant it might have been under the law prior to this Act becomes immaterial for the purpose of this Act since the Act does not make any distinction or lay down different rules of succession between the case of a person belonging to one caste and the case of a person belonging to another caste of the Hindu community.

11. Scheduled Tribes.—Sub-section (2) of section 2 provides that nothing in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution, unless the Central Government by notification in the Official Gazette otherwise directs. Clause (25) of Article 366 of the Constitution defines Scheduled Tribes as follows

“Scheduled Tribes means such tribes or tribal communities or parts of or groups of such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution”.

Article 342 of the Constitution provides as follows

“(1) The President may with reference to any State or Union Territory after consultation with the Governor thereof, by public notification specify the Tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory as the case may be

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of

or groups within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

The Constitution makes a distinction between a Scheduled Tribe and a Scheduled Caste defined under clause (24) of Article 366 of the Constitution.

"Scheduled caste means such castes, races, or tribes or parts of or groups within such castes or races or tribes, as are deemed under Article 341 to be scheduled castes for the purposes of this Constitution"

Sub-section (2) of section 2 of the Hindu Succession Act applies only to the Scheduled Tribes and not to scheduled castes as defined above. The President in exercise of the powers conferred by Article 342 (1) had promulgated what is known as the Constitution Scheduled Tribes Order, 1950, under which the tribes or tribal communities or parts of or groups within tribes or tribal communities specified in Parts I to 14 of the Schedule to the said Order, shall in relation to the States to which these respectively relate, be deemed to be Scheduled Tribes so far as regards members thereof resident in the locality specified in relation to them respectively in those parts of the Schedule. These tribes have peculiar customs and usages of their own which are not in conformity with the principles and rules of Hindu Law and necessarily the usages and customs of each tribe have to be considered before applying the Hindu Succession Act to them on the footing that they are Hindus. But once the Act is made to apply to them by notification in the Official Gazette by the Central Government, all their usages and customs to the contrary are swept away by the provisions of this Act and the succession in their case will be governed by this enactment. But till there is such a notification the Scheduled Tribes will be governed by the customs and usages as hitherto. Even when there is to be a notification under this Act, it is for the Central Government to consider whether the entire Act should apply to them without any qualification or only some parts of the Act. The words "otherwise directs" in sub-section (2) of section 2 of the Hindu Succession Act do not prevent a partial application of this Act being directed by the notification of the Central Government. For instance the direction may be that the provisions of the Hindu Succession Act relating to the property of a deceased, male alone shall apply leaving the customs and usages governing the property left by a deceased woman of the tribe to continue to operate as before. But generally without prejudice to this power of the Central Government to notify and direct a partial application of this Act, the Central Government when it decides to apply this Act would do well to apply it as a whole and not only some portions of it as otherwise that will introduce into the law of the tribes further uncertainty and confusion which the object of this legislation is clearly to avoid.

3. Definition and Interpretation.—(1) In this Act, unless the context otherwise requires,—

(a) "agnate"—one person is said to be an "agnate" of another if the two are related by blood or adoption wholly through males,

(b) "aliyasantana law" means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Aliyasantana Act, 1949 (Madras Act IX of 1949) or by the customary *aliyasantana* law with respect to the matters for which provision is made in this Act:

(c) "cognate"—one person is said to be a "cognate" of another if the two are related by blood or adoption but not wholly through males,

(d) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family,

Provided that the rule is certain and not unreasonable or opposed to public policy, and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family,

(e) "full blood", "half blood" and "uterine" blood—

(i) two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife, and by half blood when they are descended from a common ancestor but by different wives,

(ii) two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands,

Explanation.—In this clause "ancestor" includes the father and "ancestress" the mother,

(f) "heir" means any person, male or female, who is entitled to succeed to the property of an intestate under this Act,

(g) "intestate"—a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect

(h) "marumakkattayam law" means the system of law applicable to persons—

(i) who, if this Act had not been passed would have been governed by the Madras Marumakkattayam Act, 1932 (Madras Act XXII of 1933), the Travancore Nayar Act; the Travancore Ezhava Act, the Travancore Nanjnad Vellalla Act, the Travancore Kshatriya Act; the Travancore Krishnavaka Marumakkathayee Act, the Cochin Marumakkattayam Act, or the Cochin Nayar Act with respect to the matters for which provision is made in this Act (II of 1100, III of 1101, VI of 1108, VII of 1115, XXXIII of 1113, XXIX of 1113); or

(ii) who belong to any community, the members of which are largely domiciled in the State of Travancore Cochin or Madras, as it existed immediately before the 1st November, 1956], and who, if this Act had not been passed, would have been governed with respect to the matters for which provision is made in this Act by any system of inheritance in which descent is traced through the female line, but does not include the *aliyanana* law;

(i) "nambudri law" means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Nambudri Act, 1932; the Cochin Nambudri Act, or the Travancore Malayala Brahmin Act with respect to the matters for which provision is made in this Act (Madras Acts XXI of 1933, XVII of 1113 and III of 1106),

(j) "related" means related by legitimate kinship:

Provided that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly.

(2) In this Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females

Section 1—Synopsis

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| 1. Agnate. | 7. Full blood, half-blood and uterine blood, |
| 2. Aliyasantana Law. | 8. Heir. |
| 3. Cognate. | 9. Intestate. |
| 4. Custom and usage. | 10. Marumakkattayam Law. |
| 5. Custom not to be opposed to public policy | 11. Namboodri Law. |
| 6. Cessation of family custom | 12. Illegitimate children. |

1 **Agnate.**—An agnatic relation is one, whether male or female, whose relationship to another is only through males. Thus a son's son of a Hindu male is an agnate of his father's father. So also the sons of brothers are agnates of each other. Similarly the sons of paternal uncles will be agnatically related to each other. The point to be noted is there should not be a female link in the chain of relatives. Such agnatic relationship is to be postulated even with reference to relationships traced through adoption. Thus in the case of a relationship between a Hindu and his son's son, the latter may have been adopted from another family but by adoption is grafted to the adoptive family as if he is born in it. The expression 'adoption' refers to adoption of persons in the regular Dattaka form and not to customary adoptions as in the case of the Kṛtarjima or Illatom adoptions because in the latter kinds of adoptions the person adopted does not lose his filiation to his natural family and continues to belong to that family unlike in the case of a *dattaka* adoption. Now adoptions and their validity are governed by the Hindu Adoptions and Maintenance Act.

2. **Aliyasantana Law.**—The expression Aliyasantana Law has been defined as the system of law applicable to persons, who if the Act had not been passed, would have been governed by the Madras Aliyasantana Act, 1949. One chief feature of *aliyasantana law*, in common with *marumakkattayam law*, is that rights of succession depend upon relationship through females and the fact that a person is the issue of a male does not confer on the issue any right in the property of the father. But if the child is the offspring of a female, then that child gets rights of succession and other rights traceable through the female. The customary law of *aliyasantana* has been modified and codified by the Madras Aliyasantana Act, 1949, which was made applicable to certain persons and parts in the Madras State. But outside the said Act and the persons governed by it, there was the customary *aliyasantana* law in operation. So far as succession to properties of persons hitherto governed by the Aliyasantana Act or customary *aliyasantana* law is concerned this Act supersedes, the same under section 17 of this enactment. As to the extent of the modification or alteration of the law governing the *aliyasantana* see commentaries under section 17.

Aliyasantana law as well as the Marumakkattayam law is a development of the matriarchal system that had survived in the West Coast on account of the customs and usages which imparted to the female members of the family an importance around which revolved the entire structure of the society in the West Coast. There is no doubt that every human society

in its infancy must have been matriarchal and the patriarchal society which gained ascendancy and practically effaced the matriarchal as civilization advanced in every country could however not assert itself in particular parts of the world owing to the stubbornness of social customs and the general disinclination of the people for a change in the system which in those particular tracts or communities had not been found to be working unsatisfactorily. But statutory inroads into the incidents of social customs had been made to bring the people governed thereby more and more in line with their compatriots living in other parts of the country. But such modifications had been piecemeal and partial, and so far as succession was concerned the rules whether under the customary law or under the statute law were both cumbrous and complicated. It is this legislation, *etc.*, the Hindu Succession Act, that gives to what may be called a complex and out-of-date body of rules, a set of intelligible principles founded upon justice and reason.

3 Cognate—The expression "cognate" has been defined in clause (c) of section 3 (1) as "one who is related by blood or adoption but not wholly through males". This is in contrast with the definition *agnate* already considered which indicates a relationship wholly through males. Thus a daughter's son or a sister's son or father's sister's son is a cognate because the relationship is traced not wholly through males. There is the female link in the relationship of each of these relatives. It does not matter how many female links there are. The point is, whenever there is a relationship traced through a female, then it is a cognate relationship. There is, however, one defect in the definition of agnate and cognate. The position of a sister or the father's sister or daughter will fall within the definition of agnate, because there is no female link in the relationship, though the relation is a female. Still neither of these ladies, at any rate after marriage, is considered as an agnate by a Hindu. So also in the case of a wife or daughter-in-law, the relationship is by matrimony and is not by blood or adoption, and neither the definition of agnate nor the definition of cognate would apply to that case. But she is considered an agnate having become part of the husband and partaking notionally of his relationship to the person concerned. It should be remembered that neither the definition of agnate nor the definition of cognate excludes female relations, and any agnatic relation or cognatic relation, however remote in ascent or descent or both, to a deceased is given the right to inherit to the deceased if he or she comes under sections 8 and 12 of the Act.

4 Custom and usage—The expressions 'custom' and 'usage' are defined in clause (d) of subsection (1) of section 3 as signifying any rule which having been continuously and uniformly observed for a long time has obtained the force of law among Hindus in any local area, community, group or family. But the rule must be certain and not unreasonable or opposed to public policy. In the case of a custom or usage applicable only to a family, it should not have been discontinued by the family. Thus the custom or usage may be local, tribal, communal, group or family custom or usage. In case of a local custom or usage, the rule is observable in a particular locality and has relation to that locality, and numerous are such rules obtaining in the Punjab. As regards tribal customs or usages, one finds a number of them obtaining among some of the hill-tribes in the Nilgiris and in the Central Provinces and Assam. Communal customs or usages, vary from community to community and the fact that a custom obtains in a particular community in a locality does not mean that it also obtains in another community in that locality. Similar reasoning will apply to group usages and family usages. As the first proviso to the definition states, the rule which is relied on as constituting the custom or usage must not be of a nebulous, uncertain or indeterminate character but must be capable of proof as a certainty. Besides, a custom which is unreasonable will not be recognised

by law. Whether a custom is reasonable or unreasonable is not to be determined by the notions obtaining amongst the people governed by the custom but on abstract principles which have an appeal to enlightened commonsense. The idea underlying the Succession Act is to rationalise the concepts that ought to inhere in the rules governing inheritance, and this proviso is only one of the safeguards in that scheme.

5. Custom not to be opposed to public policy—The first proviso to the definition of custom and usage also states that the rule should not be opposed to public policy. Section 23 of the Contract Act contains a similar provision with reference to the consideration or object of an agreement being unlawful if it is forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law or is fraudulent or involves or implies injury to the person or property of another or the Court regards it as immoral or *opposed to public policy*. We can safely presume that any usage or custom which falls under any of the invalidating conditions in section 23 of the Contract Act will easily be invalid either as unreasonable or as opposed to public policy. Public policy is one which tends to the welfare of the community or the State, and a usage or custom which has the contrary effect will not be valid. Public "policy is that principle of law," according to Lord Truro in *Egerton v Brounlow*,¹⁴ "which holds that no subject can lawfully do that which has a tendency to be injurious to the public or is against the public good." But this is a very vague and elastic expression and there can be no clear-cut and fixed classification of what are consistent with and what are opposed to public policy. Much depends upon what the particular Judge dealing with a custom new in the instance feels about it, whether it is so repugnant to commonsense and common reason and common good that one's mind rebels against it or is of such a nature that one can allow it to continue as an innocuous and neutral usage which does not do harm to anybody. Judges who had to deal with the question of public policy have as often as not refused to stretch this vague and elastic term beyond the cases actually decided with reference to the matter: *Richardson v Mellish*¹⁵

6. Cessation of family custom—The second proviso deals specifically with a case of cessation of a family custom. A family being a small and a compact group, it is easier to develop a usage and it is as easy to give it up. Hence the proviso provides that in the case of a family usage it will not be recognised simply because it once prevailed in the family, if it is shown that subsequently it has been discontinued by the family. It is a matter for consideration whether the second proviso which contemplates a case of discontinuance of family usage or custom, by necessary implication, rules out the cessation or discontinuance of a custom or usage attached to a locality, tribe, community or group. In other words, the second proviso gives room for reflection whether there cannot be a discontinuance of any custom or usage other than the one attached to a family. The answer must be in the affirmative for the reason that the definition in the main clause itself postulates the continuance of the custom or usage and its obtaining the force of law amongst Hindus governed by it. And the additional qualification that it must have been continuously and uniformly observed for a long time, further ensures the continuance of the custom at the time the question arises and if it is shown to have fallen into desuetude it will not come within the definition of custom or usage here given.

(14) (1853) 10 Eng. Reports 359.

(15) (1824) 130 Eng. Reports 294.

7 Full-blood, half-blood, and uterine-blood.—Two persons are said to be related to each other by full-blood when they are descended from a common ancestor by the same wife, and by half-blood when they are descended from a common ancestor by different wives. Thus two brothers born of the same father and mother are related by full-blood. But if the brothers are born of the same father but of his different wives, they are related by half-blood. The same principle and reasoning will apply to their descendants. Thus the sons of one brother are related by full-blood to the sons of another brother when the brothers are born of the same parents. Similarly, the sons of one brother are related by half-blood to the sons of another brother when the brothers are born of the same father but of different mothers. Here the mothers are used in the sense of legal wives of the father. A son born of a lawfully wedded wife cannot be said to be related to a son born to the concubine of the father, either by full-blood or half-blood. The full-blood and half-blood relations are conceivable only in the case of the parents having been lawfully married, and not otherwise.

Two persons are said to be related to each other by uterine blood when they are descendants from a common ancestress but by different husbands. Here also the parents must have legally married. A son born to a woman by her first husband is related by uterine blood to a son born to that woman by a second husband whom she had married either after the death of the first husband or a divorce of that husband. A son begotten on a woman by her husband cannot be said to be related by uterine blood to a son born to her outside wedlock before her marriage. A woman may by pursuing a course of promiscuous conduct, get a child and subsequently she may return to the path of virtue and morality and settle down in marriage and get a child by her husband. These two children cannot be said to be related by uterine blood. So also a woman may get a son having been begotten on her husband in lawful wedlock but subsequently after the death of her husband she may lead a questionable life and get a child. Again these children cannot be considered to be related by uterine blood because the definition in clause (e) (ii) of sub-section (1) of section 3 says that the descendants must have come from a common ancestress but by *different husbands*. Unless therefore the children are born of the husbands of the same woman the question of uterine blood does not arise. Whether it be a relation by full-blood or half-blood or by uterine blood, the relationship must be by legitimate kinship and this is made clear by the definition of 'related' in clause (j) of the sub-section.

8 Heir.—The expression 'heir' is described as any person male or female who is entitled to succeed to the property of an intestate under this Act. A person can be an heir of another, whether the latter leaves any property or not and that is the reason why the definition talks of a heir being entitled to succeed to the property of an intestate. In other words, it is enough if he has the right to succeed to the property, if any, and the fact that there is no property does not take away a person's right to be called an heir of another. The definition of an heir is somewhat clumsy though for all practical purposes it is quite workable. The question of a person being the heir of another arises only when the latter has died intestate. But the intestacy need not be in respect of the deceased's entire property. A man may die intestate with reference to some of the properties and die testate with reference to other properties regarding which he has left a valid will. Even when a man leaves a will in respect of all his properties, he will be considered to have died intestate if the will is for any reason invalid. If the will is invalid only partially, then he will be regarded as having died testate with reference to properties over which the valid portion of the will operates and intestate in respect of properties regarding which the will does not operate on account of its partial invalidity.

9. **Intestate.**—A person is said to die intestate in respect of properties of which he or she has not made a testamentary disposition capable of taking effect. The fact that a person has left a will does not mean that he has not died intestate. It depends upon whether the will is a valid will or a void one or how far it is valid or to what extent it is void. A will may be valid partially and invalid in part. It may operate in respect of some of the properties and be inoperative in respect of other properties comprised in the will. It may be effective with reference to some of the devisees and ineffective with reference to others. What is necessary to remember is this: that apart from being considered intestate when he has left no will at all a person can be considered as intestate even when he has left a will if the will is for any reason or to any extent invalid and inoperative.

10. **Marumakkattayam Law.**—Marumakkattayam means succession by the sister's children. Under the Marumakkattayam Law obtaining in Malabar the properties go to the children of sister. If a man has property and dies, under this law it does not descend to his children but it goes to the children of his sister. His own children succeed to the property of their mother's brother. Under the Malabar Law there are large families known as tarwads. The members of a tarwad are the descendants of an ancestress tracing the descent through female links. This is the old law. But there had been changes in this customary law by statutes and clause (A) therefore defines Marumakkattayam law as meaning the system of law applicable to persons who had been governed by the Madras Marumakkattayam Act, 1932, the Travancore Nair Act, the Travancore Ezhava Act, the Travancore Nanjinad Vellala Act, The Travancore Kshatriya Act, The Travancore Krishnavaka Marumakkattayam Act, the Cochin Marumakkattayam Act, the Cochin Nayar Act with respect to the matters for which provision is made in this Act, or who belong to any community the members of which are largely domiciled in the State of Travancore-Cochin or Madras and who if this Act had not been passed would have been governed with respect to the matter for which provision is made in this Act by any system of inheritance in which descent is traced through the female line but does not include the Aliyasantana Law. There are some differences in the incidents and the rules between the Marumakkattayam Law and the Aliyasantana Law as they obtain under the customs and usages of the people governed by them (See the Chapter on Malabar Tarwad).

11. **Namboodri Law.**—Namboodri Law means the system of law applicable to persons who if this Act had not been passed would have been governed by the Madras Namboodri Act, 1932, The Cochin Namboodri Act or the Travancore Malayala Brahmin Act with respect to the matters for which provision is made in this Act. For the detailed schemes and provisions of these Acts see the Acts.

12. **Illegitimate children.**—There are three categories of children now in vogue, namely, legitimate children, adopted children and illegitimate children. Legitimate children are those born of lawful wedlock. Adopted children are those affiliated into the family by methods recognised by Law as giving them the rights of persons born in the adoptive family. The illegitimate children are those born outside lawful wedlock. The last category of children may trace their relationship both to their father and to their mother. Legitimacy is an express pre-condition of relationship which alone can constitute the foundation of the right under the Act to succeed. The proviso to section 3 (1) makes the position clear. Illegitimate children cannot be included within the meaning of the words "son" "daughter" and daughter of predeceased son in class I of the Schedule^{1a}. They cannot invoke the general rules in section 8 to succeed.

to the estate of his or her putative father¹⁷. But under the Act any relationship between the putative father and the children is ruled out and the only relationship that the illegitimate children can claim is the relationship to their mother and through their mother to one another and their legitimate descendants. Thus if a woman has two illegitimate sons each of these sons can claim to be related to the mother and to each other. So also the legitimate son of one of the illegitimate sons can claim to be related to the legitimate sons of the other illegitimate son. But an illegitimate son of one illegitimate son cannot claim to be related to the son of another illegitimate son whether that son's son is legitimate or illegitimate. In other words, the relationship of illegitimate sons is confined to the mother and her illegitimate issue and a legitimate issue of her illegitimate issue. There is no relationship between the illegitimate issue of one illegitimate son to the legitimate or illegitimate issue of another illegitimate son, nor is there a legal relationship between an illegitimate son of a woman and a legitimate son of that woman, nor a relationship between the sons of the illegitimate son and the sons of the legitimate son.

4. Overriding effect of Act—(1) Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act,

(b) Any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceiling or for the devolution of tenancy rights in respect of such holdings

Section 4—Synopsis

1 Overriding effect of the Act.

2 Prevention of fragmentation of holding.

1 Overriding effect of the Act.—This section lays down the overriding effect of the Act on the law as it obtained previously and says “(1) Save as otherwise expressly provided in this Act (a) any text, rule, or interpretation of Hindu Law, or any custom, or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act, (b) Any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act (2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.”

It is clear that the effect of the Act is that if there is any provision in this Act in respect of any matter governed by Hindu Law previously, then this provision prevails and the previous Hindu Law to the extent it related to that matter stands nullified. Also any other

(17) *Dadoo v. Ragunath*, 1978 Mah L.J. 739 1979 Bom 176.

law which applied to the Hindus before the commencement of this Act ceases to operate if it is inconsistent with any of the provisions contained in this Act.¹⁸ Clause (a) of sub-section (1) relates to what one may call the 'personal law' of the Hindus derived from the original Sanskrit texts, commentaries and their interpretations and the customs or usages which are incorporated into that personal law as incidents governing the persons subject to that law. Clause (b) provides for nullifying the effect of previous statute law governing Hindus made from time to time with a view to rationalise the personal law of the Hindus in respect of matters on which that law was not in conformity with modern notions and sentiments. The net result is, whether it be the personal law as gatherable from the texts and customs of the Hindus or the statute law as applicable to the Hindus hitherto, both get nullified as a result of this enactment, subject to the condition that there is a specific provision with reference thereto in this Act governing the particular matter. Whether the old personal law is consistent or inconsistent, it goes, if there is a provision with reference to a particular matter in this Act. If the old law under the statute governing the Hindus is inconsistent with any of the provisions in this Act, it goes but otherwise it remains, thus there may be a provision under a statute which does not conflict with the provisions in this Act. No doubt if both the provisions have the same effect the old provision is not repealed by this, but it is this provision, being later statutory enactment, that would apply. Besides, all other statutory provisions which though not dealing with a particular matter provided for in this Act but are inconsistent with the provision in this Act will stand nullified. In other words, only those incidents of personal law and those incidents of previous statute law which applied to the Hindus and which do not conflict with the provisions herein continue. All other provisions have no longer any operation so as to govern the Hindus, if they are inconsistent with the provisions of this enactment.

The Act has not interfered with the Hindu Law relating to Mitakshara Coparcenary except in so far as it is modified by section 30 and the proviso to section 6 of the Act.¹⁹ As no rules of partition are provided in the Act the general Hindu Law has to be resorted to find out what would have been the share of the deceased if a partition had taken place immediately before his death.²⁰ The right of a coparcener in Tamil Nadu to alienate for value his undivided interest is not affected in any way by the passing of this Act.²¹

The theory of pious obligation cannot be deemed to have been abrogated by this Act. *Modi Nedabas v. Mansi Bai*.²²

The right of the reversionary heir to appeal to the Court for the conservation and just administration of the property held by a limited owner so that the corpus of the estate may pass unimpaired to those entitled to the reversion being a remedy of a very substantial character cannot be taken away except by specific legislation and the Hindu Succession Act has not taken away that right.²³ The Hindu Law regarding the rights of the reversioners to recover possession of the property improperly alienated by the widow having only a limited interest

(18) *Prilam Singh v. Controller of Estate Duty*, (1976 78 FmJ 1, R. 342 (F.B.).

(19) *Chandradatta v. Sankar Kumar*, 1973 M.P. 169.

(20) *Jai Parkash v. Ram Kali*, 1974 Cur. L.J. 292.

(21) *Mollayen v. Anjali*, (1975) 1 M.L.J. 245.

(22) 1962 Guj 68; see also *Chandradatta v. Sankar Kumar*, supra.

(23) *Radhey Krishna v. Shree Shankar*, 1973 S.C. 2405; (1974) 1 S.C.J. 539.

therein is not abrogated by the provisions of this Act where the widow had alienated the property for no necessity or benefit of the estate prior to the Act by way of sale, and she could not, therefore, be said to be in possession of the property at the time when the Act came into force. *Mst Janki v. Kishan* ²⁴ It was held by the Supreme Court that the suit of a reversioner for a declaration that an adoption by a widow to the last male holder was invalid could not succeed after coming into force of the Hindu Succession Act, 1956; for, if the adoption is invalid, the adopter's possession was permissive and the widow was in constructive possession of the properties and had acquired an absolute right under the Act. *Kothruswami v. Varada*.²⁵

Section 4 cannot be said to have abrogated the rules of Hindu law which are not touched by this enactment. The conception of reversioner, therefore still remains in respect of the properties in which the widow does not become a full owner under section 14, as, for instance, when the widow had parted with a property by way of sale prior to the Act, in which case, if the sale had not been for necessity or benefit, the reversioner would be entitled to recover possession of the property as under the Hindu Law. *Gangadhar Chavan v. Saraswati* ²⁶ Unchastity of a widow as a disqualification to her succeeding to her husband's estate must be held to be abrogated by this Act ²⁷ Similarly the custom of *shilom* adoption and rights of heirship incidental to it must be deemed to be overridden by Section 4 of this Act.²⁸

2. Prevention of fragmentation of holdings.—In view of an increased number of co-heirs introduced under this Act, there is an apprehension that it will lead to fragmentation of agricultural holdings resulting in undermining the economy of the country. Uneconomic holdings of agricultural lands have been the subject of several attempts at legislation in recent years and the object of the second sub-section of this section is to prevent such uneconomic holdings resulting by the application of the provisions of this enactment. If there is a statute in any of the States preventing fragmentation of agricultural holdings or for the fixation of ceiling for such holdings or for the devolution of tenancy rights in respect of such holdings, then that Act is not affected by this enactment ²⁹ This saving applies not only in respect of Acts already on the statute book but also to enactments that may be passed hereafter with a view to prevent splitting of agricultural lands into uneconomic holdings. For the meaning of the words the "provisions of any law for the time being in force". See *Seetha Bai v. Kothadai*.³⁰

(24) 1959 M.P. 1.

(25) 1959 S.C.J. 437 (1959) 1 M.L.J. (S.C.) 158 (1959) 1 An. W.R. (S.C.) 158; (1959) (Supp.) S.O.R. 968

(26) I.L.R. (1962) Cut. 596; 1962 Orissa 190

(27) *Kagendranath v. Karunadhar*, 1978 Cal 491 82 Cal. W.N. 979; *Jayalakshmi v. Gnanas Iyer*, (1972) 2 M.L.J. 72 1972 Mad 357.

(28) *Narayanappa v. Government of Andhra Pradesh*, (1978) 2 A.P.L.J. 60.

(29) See *Prima Datta v. Jt Director of Consolidation*, 1970 All. 238; *Uma Shankar v. Director of Consolidation*, 1973 All. 407, *Nahar v. Mst. Dukhin*, 1974 M.P. 141; *Falak Dohri v. Dy. Director of Consolidation*, 1975 All. 410

(30) A.L.R. 1959 Bom. 78; I.L.R. (1959) Bom. 604.

CHAPTER II

INTESTATE SUCCESSION

General

5. Act not to apply to certain properties.—This Act shall not apply to—

- (i) any property succession to which is regulated by the Indian Succession Act, 1925, by reason of the provisions contained in Section 21 of the Special Marriage Act, 1954 (XLIII of 1954.)
- (ii) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act,
- (iii) the Valliamma Thampuran Kovilagam Estate and the Palace Fund administered by the Palace Administration Board by reason of the powers conferred by Proclamation (IX of 1124), dated 29th June, 1949, promulgated by the Maharaja of Cochin

Section 5—Synopsis.

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| 1. Act not to apply to certain properties | 3. Act applicable to agricultural lands also. |
| 2. Primogeniture. | |

1 Act not to apply to certain properties.—This section provides “this Act shall not apply to (1) any property succession to which is regulated by the Indian Succession Act, 1925, by reason of the provisions contained in section 21 of the Special Marriage Act, 1954, (2) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act; (3) the Valliamma Thampuran Kovilagam Estate and the Palace Fund administered by the Palace Administration Board by reason of the powers conferred by Proclamation (IX of 1124), dated 29th June, 1949, promulgated by the “Maharaja of Cochin”. It is clear that this Act has no application to the property succession to which is regulated by the Indian Succession Act by reason of Section 21 of the Special Marriage Act. Section 21 of the Special Marriage Act provides that succession to the property of any person whose marriage is solemnised under the Special Marriage Act and to the property of the issue of such marriage shall be regulated by the provisions of the Indian Succession Act except that where both the parties to such marriage, professed to be Hindus, Buddhists, Sikhs or Jains by religion the Hindu Succession Act alone will govern according to Section 21-A inserted into the Special Marriage Act by the Marriage Laws (Amendment) Act, 1976. What section 5 of the Hindu Succession Act effectively means is as that regards succession even though the son is legitimate and can be deemed to be a Hindu his rights to succeed to his Hindu father on intestacy have to be governed by the provisions of the Special Marriage Act.¹

(1) *Sridharan v. Commissioner of Wealth-tax*, (1970) 2 M.L.J. 334, 1970 Mad. 249.

2 Primogeniture—The second clause to this section provides for the Act not applying to or affecting the rule of primogeniture obtaining in certain families by the terms of any covenant or agreement entered into by a Ruler of an Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act. It is obvious that the rule of primogeniture obtaining only under the usage or custom of a family is no longer enforceable so as to affect the operation of this Act, and the only rule of descent to a single heir recognised under the enactment is the rule which obtains in the families of Rulers of States and not in other families. That rule, besides, must be a rule which must have been sanctioned in or by agreement between the ruler and the Government or by an enactment of the Legislature passed for the purpose.

3. Act applicable to agricultural lands also.—The Act applies to agricultural lands also. The omission by Parliament of the words "save as regards agricultural lands" from item 5 of the Concurrent List in Schedule 7 of the Constitution in order to have a uniform personal law for Hindus throughout India shows that this Act is intended to apply to agricultural lands as well, *Laxmi Devi v. Surendra* ¹

6 Devolution of interest in coparcenary property—When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act not by survivorship.

Explanation 1—For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2—Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

Section 6—Synopsis

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| 1 Scope | 7 Proviso—Exception to rule of survivorship in the Mitakshara coparcenary |
| 2 When a male Hindu dies | 8 Will by a Mitakshara coparcener |
| 3 Mitakshara coparcenary | 9 Gifts and other alienations by a coparcener |
| 4 Coparcenary property | 10 Alio-utro by father |
| 5 Coparcenary and Hindu Women's Rights to Prop. Int. Act. | 11 Alienation by manager. |
| 6 Devolution by survivorship | 12 Alienation by coparcener |

(2) A I R 1957 Orissa 1.

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| 13. Liability for coparcener's debts. | of the Schedule. |
| 14. Anomalies in succession under this section. | 16. Explanation (1) of the section. |
| 15. Effect on the coparcenary of the death of a coparcener leaving female heir in class (1) | 17. Explanation (2) of the section. |

1. **Scope.**—This section is one of the important sections of this enactment and raises questions of no little difficulty in its consideration for the ascertainment of its scope and the intention underlying it. The section is headed "devolution of interest in coparcenary property" and consists of four paragraphs. The first paragraph deals with the main enunciation of the previous law regarding devolution by survivorship in Hindu coparcenary. The second paragraph in the shape of a proviso provides for the exceptions to survivorship by devolution. The third paragraph by way of *Explanation 1* provides that the interest of the coparcener for the purpose of devolution shall be considered to be the share which would be allotted to him if there was a partition immediately before his death. The last paragraph by way of *Explanation 2* prevents the divided members from claiming the interest of a deceased coparcener on intestacy.

Section 6 postulates the existence of a coparcenary. There cannot be a coparcenary consisting of a single individual even if the property in his possession is coparcenary property. The coparcenary contemplated by the section is a coparcenary consisting of more than one individual where on the death of one coparcener the property can devolve on the others by survivorship³. (The section is concerned with the devolution of a deceased coparcener's interest alone. It has nothing to do with the disruption of the joint family status. The coparcenary will continue despite the death of a coparcener till a partition is effected⁴. The Act does not make any distinction between coparcenary property and joint family property for purposes of section 6⁵.)

The expression "surviving members of the coparcenary" in para 1 of section 6 means surviving coparceners. A widow taking her husband's share under section 3 (2) of Act XVIII of 1937 is not a coparcener and has no right of survivorship under that section⁶.

2. **When a male Hindu dies.**—This section deals with devolution of coparcenary interest in the case of a male Hindu dying after the Act undivided in a Mitakshara coparcenary. It does not deal with the devolution by inheritance of the separate property of a Hindu male which is governed by Section 8 followed by Sections 9, 10, 11, 12 and 13. Nor does it deal with devolution by inheritance of the property of a female Hindu which is governed by Sections 15 and 16. A question may arise as to what is to happen to the interest which a widow has taken in the joint family property under the Hindu Women's Rights to Property Act of 1937. This section cannot obviously apply because its application is restricted to the death after the Act of a male Hindu having an interest in a Mitakshara coparcenary property. Would Section 15 which deals with general rules of succession in the case of female Hindus apply? That section is restricted to devolution of the 'property of a female Hindu,' the expression 'property of a female Hindu' apparently meaning the absolute property of a female Hindu. Since the interest which a woman has taken under the Hindu Women's Rights to Property Act is not an absolute interest but only the interest known as the Woman's Estate in

(3) *Appalanaidu v. Narayanamma*, (1972) 1 An. W.R. 306 1972 A.P. 258

(4) *Gowda Reddy v. Obulamma*, (1971) 2 An. W.R. 43, 1971 A.P. 363 (F.B.).

(5) *Devraj v. Jayalakshmi*, (1971) 1 M.L.J. 429-83 L.W. 756.

(6) *Laxmiprasad v. Madan Mohan*, 1978 M.P.L.J. 485.

Hindu Law, can it be governed by the rules laid down in Section 15 or in the next section? The answer seems to be that by reason of the repeal of the Hindu Women's Rights to Property Act of 1937 under Section 31 of the Hindu Succession Act, 1956, the interest which she has taken under that Act must be governed only by this Act. The section that would govern such interest would be Section 14, attracting with it the rules of devolution laid down in Sections 15 and 16. The property which a widow has taken under the Hindu Women's Rights to Property Act of 1937 is certainly "property possessed by a female Hindu" within the meaning of the 1st clause of section 14 and having been acquired by her before the commencement of this Act, shall be held by her as full owner and not as a limited owner. (The absoluteness of the interest taken by her for the purpose of attracting Sections 15 and 16 is obvious and undeniable.)

3. *Mitakshara coparcenary*.—There is a distinction between a joint family under the Mitakshara school and a coparcenary under that system. A joint Hindu family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters bound together by the fundamental principle of sapindaship or family relationship which is the essence and distinguishing feature of the institution. This body is purely a creature of law and cannot be created by act of parties (*Sudaraman v. Narasimhalu*,⁸; *Abraham v. Abraham*,⁹) save in so far as by adoption or marriage a stranger may be affiliated as a member thereof. An undivided family which is the normal condition of Hindu society is ordinarily joint not only in estate but in food and worship, and, therefore, not only the concerns of the joint family, but whatever relates to their commensality and their religious duties and observances are regulated by the members or by the manager to whom they have expressly or by implication delegated the task of regulation (*Raghunada v. Briju Kishore*,¹⁰). The joint family status being the result of birth, possession of joint property is only an adjunct of the joint family and is not necessary for its constitution (*Haridas v. Devakibai*,¹¹; *Laldas v. Matibai*,¹²; *Janakiram v. Nagamony*,¹³). Nor is it that all the members possess equal rights or status even though the property of the family is called joint family property. For instance, the female members of the family like the daughters have no share in the property, not have the male descendants remoter than the great-grandson. Besides, the daughter cannot remain a member of her father's family after her marriage, *Kartick Chander v. Sarada Sundari*,¹⁴ and the sisters, though they were once entitled to a share in the property, have now lost that right and are now entitled only to maintenance until their marriage and their marriage expenses (*Subbaya v. Ananta Rameyya*,¹⁵. See also *Krishna Pratap v. Premabada*,¹⁶). The texts prescribing the giving of a fourth share to the sister are only directory. A joint family cannot be said to come to an end merely because the last

(7) See also *Deyu Singh v. Dhan Kaur*, (1974) 2 S.C.J. 245; 1974 S.C. 663.

(8) 25 M. 149; 11 M.L.J. 355.

(9) 9 M.L.A. 195.

(10) 1 M. 69; 3 I.A. 154 (P.C.).

(11) 50 B. 443 at 447; 1025 B. 408, 28 Bom. L.R. 637.

(12) 10 Bom. L.R. 178.

(13) 49 M. 98; 1926 M. 273; 22 L.W. 801; 50 M.L.J. 415.

(14) 18 C.I. 642.

(15) 53 M. 84; 1929 M. 506; 30 L.W. 923; 57 M.L.J. 886 (F.B.).

(16) 1942 A.I. 563.

surviving male member thereof dies, leaving only some widows. The reason is that it is possible even then for any of the widows to make an adoption and reflex a joint family consisting of male members as before, and it is held that so long as this possibility is there, it cannot be said that there is no joint family. (*Anant v. Shankar*.)¹⁷

Coparcenary is a narrower body than a joint family and consists of only those persons, who have taken by birth an interest in the property of the holder for the time being and who can enforce a partition whenever they like. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. Thus while a son, grandson, or a great grandson is a coparcener, the great-great-grandson cannot be a coparcener with him, because he is removed by more than three degrees from the holder. The reason why coparcenership is so limited is to be found in the peculiar tenets of the Hindu religion that only descendants upto three degrees can offer spiritual ministrations to an ancestor. Besides only males can be coparceners, and all females are excluded from the coparcenary. *Hira Singh v. Mi Mangal*¹⁸, *Panna Bibi v. Radha Kissen*¹⁹, because the test of coparcenership is the right to enforce a partition and no female has that right though females like wives and mothers may be allotted shares when a partition takes place. Though a common ancestor is necessary for the origination of a coparcenary, it may yet continue without him, consisting of collaterals and their descendants some of them being removed more than three degrees from the deceased common ancestor (*Tennulala v. Ramadora*,²⁰ *Girwartharu v. Kulahar*,²¹ *Mora Vishwanath v. Ganesh*)²²

4. **Coparcenary property.**—Coparcenary property means and includes (1) ancestral property, (2) acquisitions made by the coparceners with the help of ancestral property, (3) joint acquisitions of the coparceners even without such help provided there was no proof of intention on their part that the property should not be treated as joint family property and (4) separate property of the coparceners thrown into the common stock. A discussion of what constitutes coparcenary property under any of these headings is found in sections 244 to 261 of the book.

5. **Coparcenary and Hindu Women's Rights to Property Act.**—After her husband's death the Hindu widow under the Act XVIII of 1937 has got the right to demand a partition but she cannot predicate the exact share which she might receive until partition is made; her dominion extends to the entire property conjointly with the other members of the coparcenary, her possession and enjoyment is common, the property cannot be alienated without the concurrence of all the members of the family, except for legal necessity and like other coparceners she has a fluctuating interest in the property which may be increased or decreased by deaths or additions in the family. It is manifest that she cannot have any right by birth because she enters the coparcenary long after she is born and after she is married to her husband and acquires his interest on his death. Thus short of that, she possesses all

(17) 70 I.A. 232; I.L.R. (1944) B. 116; 56 L.W. 749; (1943) 2 M.L.J. 509. 46 Bom. L.R. 1; 48 C.W.N. 94; 1943 F.C. 196.

(18) 9 Lab. 324; 1928 L. 122.

(19) 31 C. 478.

(20) 6 M.H.C.R. 92.

(21) 4 S.D. 2.

(22) 10 Bom. H.C.R. 444.

the necessary *indusa* of a coparcenary interest. The fact that before the Hindu Succession Act of 1956, she had the characteristic of a widow's estate as her interest in the property does not detract from this position. It must follow as a logical corollary that though a Hindu widow cannot be a coparcener, she has coparcenary interest and she is also a member of the coparcenary by virtue of the rights conferred on her under Act XVIII of 1937²². In *Parappa v Nagamma*²³, it was held that the 1937 Act had conferred a new right on the widow of a deceased coparcener in modification of the pre-existing law. That Act did not bring about a severance of interest of the deceased coparcener. Certainly the widow was not raised to the status of a coparcener though she continued to be a member of the joint Hindu family as she was before the Act. The joint family would continue as before subject only to her statutory right. The Hindu conception that a widow is the surviving half of the deceased husband was invoked and a fiction was introduced, namely, that she continued the legal *persona* of the husband till partition. From the stand-point of the other male members of the joint family, their right by survivorship to the husband's interest was suspended. The legal effect of the fiction was that the right of the other members of the joint family would be worked out on the basis that the husband died on the date when the widow passed away. She would have during her lifetime all the powers which her husband had, save that her interest was limited to a widow's interest. She could alienate her widow's interest in her husband's share; she could even convey an absolute interest in the same for legal necessity or other binding purposes. She could ask for partition, and separate possession of her husband's share. In case she asked for partition, her husband's interest should be worked out having regard to the circumstances obtaining in the family on the date of partition.

It is clear therefore that the position of the widow under the Hindu Women's Rights to Property Act, which was that of a limited owner is in some respects that of a coparcener. Her interest fluctuated with births and deaths. She could demand a partition of her husband's share. She could make that share liable for the debts incurred by the husband and as she continued notionally the *persona* of her husband, his creditors could proceed against his interest in the hands of the widow, a right which the creditor could not claim prior to the Act unless he had attached that interest in execution of a decree obtained before the husband's death. Now under the Hindu Succession Act by reason of section 14 which enlarges the woman's estate into an absolute one, when that estate is acquired by inheritance, she becomes a fresh stock of descent as full owner and the succession will be governed so far as that interest is concerned by sections 15 and 16²⁴.

6 Devolution by survivorship.—The doctrine of survivorship which obtains in a Mitakshara joint family meant that so long as the family remained undivided the death of a member merely resulted in the augmentation of the shares of the other members who had already, had a share in the properties. The doctrine had no application to a Dayabhaga joint family under which each member of the family, though joint with the other members, held his share as a co-owner or a co-sharer without the right of survivorship amongst the other heirs. While in a Mitakshara coparcenary or joint family consisting of only males the rule of devolution is by survivorship, in the Dayabhaga joint family, this rule of survivorship has no application, the rule applicable being the rule of inheritance. Hence in the main paragraph of this section, namely,

(22) *Controller of Estate Duty v Alladi Kappaswamy*, (1977) 2 M.L.J. (S.C.) 30. 1977 S.C. 2069.

(24) (1934) 1 M.L.J. 250; (1934) Mad 183.

(25) *Lawmpraasad v Madan Mohan*, 1978 M.P.L.J. 465.

the first paragraph what is mentioned is the Mitakshara coparcenary with its incident of survivorship and not the joint family of the Dayabhaga school where the doctrine of survivorship has no application. The provision for devolution by survivorship of the interest of a deceased coparcener mentioned in paragraph 1 of the section has no application when the deceased coparcener leaves his widow or other female heir or a male heir claiming under such a female heir coming under class I of the Schedule to the Act. This is made clear in paragraph 2 of the section.

Illustrations (1) A Mitakshara coparcenary consists of a father and 3 sons. The father dies. The three sons take the entire interest by survivorship resulting in the increase of each son's share from one-fourth to one-third.

(2) A Dayabhaga joint family consists of a father and 3 sons. The father dies. The sons take the property equally each taking one share. Note in the above first illustration dealing with a Mitakshara coparcenary consisting of a father and 3 sons, each of the four members has one-fourth interest in the joint family property and each of the sons can claim a partition of his one-fourth share even against the wishes of the father. The reason is that under the Mitakshara law, in the case of a son born into the family he takes an interest by birth in the family property and that interest he can concretise by partition at any time, he likes into a definite divided share despite the will or against the protest of the other coparceners. There is however one exception to this right of the son, namely in the Bombay school where it is held that though the son has an interest by birth in the joint family property he cannot ask for a partition of that interest so long as the father who is joint with his collaterals does not assent to the partition. In contrast with this position obtaining in the Mitakshara, under the Dayabhaga school, in the second illustration given above, none of the sons has a claimable interest during the lifetime of the father and cannot claim partition or restrain the father from alienating the ancestral property. The father is the absolute owner unlike in the Mitakshara, and the sons are virtual ciphers so far as property rights are concerned. The father no doubt can give a share to each of the sons but that is in his discretion and choice which is unfettered, and the fact that one son has been given a larger share than another will not invalidate his act. After the father's death the sons no doubt take by inheritance whatever properties have been left by the father undisposed of and when they so take the property, each of them no doubt gets one-third interest in it but it is a kind of a severed interest partaking of the nature of a partitioned succession.

(3) A Mitakshara joint family consists of three brothers. One of them dies. The others take his interest by survivorship and the interest of each of the survivors which prior to the death of the brother was one-third becomes enlarged by the death into one-half.

(4) A Dayabhaga joint family consists of three brothers. One of them dies. His interest will devolve, if he has left his widow, daughter, daughter's son or mother to any of them in the order here given and not to his brothers. This will not be the case under the Mitakshara coparcenary rule of survivorship.

(5) A Mitakshara coparcenary consists of 3 brothers and their sons. One of the brothers dies. His interest will devolve by survivorship to his sons and his surviving brothers and their sons. No doubt if a partition takes place subsequently, the sons of the deceased brother will take the share of his line, namely, one-third. But if there is no partition the entire property is held joint, and if it happens that the sons of the deceased brother also die subsequently, then the surviving brothers will take the entire property.

(6) A Dayabhaga joint family consists of three brothers and their sons. One of the brothers dies. His share does not survive to the other brothers but is taken by inheritance

by his own sons. There is no question of survivorship here. Even the sons of the deceased brother take only by inheritance. No doubt if that brother had no son and heirs like widow, daughter or mother who are nearer than these brothers, the surviving brothers will take his share but that is by inheritance and not by survivorship.

(7) A Mitakshara coparcenary consists of three brothers *A*, *B* and *C*. *A* has a wife *D*, *B* has a son *E* and *C* has a son of a predeceased son *F*. *A* dies. His interest under the law prior to the Hindu Women's Rights to Property Act was taken not by his wife *D* but by *B* and *C* and also *E* and *F* because *D* is not a coparcener but *B*, *C*, *E* and *F* are coparceners entitled to succeed by survivorship to *A*'s interest. Under the Hindu Women's Right to Property Act however, *D* will take *A*'s interest.

(8) A Dayabhaga joint family consists of three brothers, *A*, *B* and *C*. *A* has a widow *D*. *B* has a son *E* and *C* has a son of a predeceased son *F*. *A* dies. His property is taken by *D* his widow and not by the others. If *A* has no widow but has a daughter that daughter will take and not the brothers or brother's children. So also if *A* has left neither a widow nor a daughter but a daughter's son, the latter being a nearer heir to *A* than *B*, *C* and others, will succeed to *A*'s interest. If *A* has left no son, widow, daughter, or daughter's son or mother, *B* and *C* will take the property and not *B*'s son *E* or *C*'s grandson *F*.

The above is the position under the Mitakshara and the Dayabhaga. Now the second paragraph of this section in the shape of a proviso makes changes to the above rules of survivorship under the Mitakshara which will be considered as the next point.

7 Proviso Exception to rule of survivorship in the Mitakshara coparcenary—

This proviso says that so long as there is a female relative specified in class (1) of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession as the case may be under this Act and not by survivorship. Under the Mitakshara coparcenary as it obtained prior to the Act, no will left by a coparcener would be valid, the reason being that as between testamentary devolution and devolution by survivorship, the latter took precedence barring the operation of the testamentary disposition. This proviso provides that if any female relative or a male relative claiming through that female relative as specified in class (1) of the Schedule survives the deceased, then the devolution is under this Act, whether the devolution is testamentary or by intestate succession. The words, "such female relative" found in the proviso to the section refers to a female relative who comes in the 1st class but who is dead but through whom the male relative claims *Ranganathan Chettiar v Annamalai Mudaliar*²⁰. The female relatives specified in class (1) of the Schedule are, daughter widow, mother, daughter of a predeceased daughter, widow of a predeceased son, daughter of a predeceased son of a predeceased daughter, widow of a predeceased son of a predeceased son. The male relative specified in that class and claiming through such female relative is the son of a predeceased daughter. In other words, the rule of survivorship which obtained in the Mitakshara joint family prior to the enactment of this legislation, to the effect that on the death of a male member the interest of that male member accrued to the other male members has no application after the Act when the deceased has left any of the female heirs mentioned in class (1) or any of the male heirs claiming through such female heirs. Thus if he has left a daughter, or a widow or a mother or daughter of a predeceased son, or son of a predeceased daughter, daughter of a predeceased daughter or

(26) 83 L.W. 258; (1967) 1 M.L.J. 389; I.L.R., (1968) 1 Mad. 685; 1968 Mad. 65.

widow of a predeceased son or daughter of a predeceased son of a predeceased son, or widow of a predeceased son of a predeceased son, then not only any Will left by him will be valid, but even if there is no Will, his interest will devolve by the rules of succession under this Act. In *Channappa Gounder v. Valliammal*²⁷, a Hindu died leaving a widow, son, daughter and widowed daughter-in-law. He had executed a maintenance deed in favour of the daughter-in-law by giving her life-interest in two items of his property. She filed a suit after her father-in-law's death for partition of the other properties of the father-in-law. It was held that the suit was maintainable under this section and neither the fact that the daughter-in-law had already been given some properties for maintenance nor the fact that the properties given to her under the maintenance deed had not been included in the suit would make the suit incompetent.

Where the proviso to section 6 applies there will be no disruption of joint family status. The coparcenary will continue till a partition is effected; but the coparcenary property will not include the interest of the deceased coparcener and the karta in relation thereto cannot exercise his powers as karta. He cannot represent the female heirs who are not coparceners²⁸. Where a father died after 1956 leaving behind wife, son and daughters they succeed to his interest under the proviso to section 6 as tenants in common and there is no coparcenary between the son and the female heirs enabling him to act as karta²⁹.

Illustration 1 A, B and C are brothers in a Mitakshara coparcenary. A dies leaving only a son and a Will of his share in the family property. The Will would be inoperative under this section but section 30 makes the Will valid regarding A's share in the coparcenary property.

Illustration 2 A, B and C are brothers in a Mitakshara coparcenary. A dies leaving a son and a widow and a Will. The rule of survivorship does not apply and the Will will be valid. It must be observed that the Will will be valid even if he disposes of the property to a stranger so long as it is confined to the testator's share in the property which will be one-sixth. In this illustration if A had died without a Will his share in the family property is one-sixth and that one-sixth will be taken by his widow and son each getting one-twelfth share with the result that the widow will get one-twelfth and the son will get three-twelfths of the property in a partition with B and C.

Illustration 3. A Mitakshara coparcenary consists of three brothers A, B and C. A dies leaving a widow. The widow takes A's share of one third and that share does not go to B and C by survivorship. If A had left a Will, that Will is valid to the extent of A's one-third share. The position will be the same if A had left instead of his widow, his daughter or mother or daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, widow of a predeceased son, daughter of a predeceased son of a predeceased son, widow of a predeceased son of a predeceased son. If in addition to any one of these, A leaves a son or son of a predeceased son or a son of a predeceased son of predeceased son, what will devolve under the Act is the share of the deceased in the coparcenary excluding the share of the surviving son, son's son or son's son's son as the case may be. And in that interest of the deceased, the son also will share along with the other heir or heirs entitled to succeed with him.

(27) 1969 Mad 187; 81 L.W. 424; (1969) 1 M.L.J. 193.

(28) *Goodale Reddy v. Obulamma*, (1971) 2 Aa. W.R. 43; 1971 A.P. 363.

(29) *Kastur Sahasani v. Das Sahi*, 1979 Orissa 80; 40 Cut.L.T. 227.

under the Act, if they come under class (1) of the schedule. If in the above illustration A has left a Will, that Will will be operative with reference to his share in the property at the time of his death. It is not necessary that the Will should be in favour of any of the above female heirs or an heir claiming under her. The object of the provision is merely to benefit the female heirs mentioned in class (1) and the male heirs mentioned therein who claim through such female heirs with reference to intestate succession. The deceased, however, is entitled to dispose of his interest by Will even in the presence of any such female heir or a male heir claiming through her and coming under class (1). Under section 30, however, a coparcener is entitled to dispose of by Will his interest in the coparcenary property irrespective of the question whether he has left a heir under the Act or not.

Where a Hindu coparcener dies leaving a son and a son by a predeceased daughter, both the son and the daughter's son succeed to his interest in the coparcenary property simultaneously as class (1) heirs and as tenants in common. *Ranganathan Chettiar v. Annamalai Mudaliar* ³⁰

In *Anantha Naik v. Hari Bandhu Naik*, ³¹ A and his sons B and C were members of a coparcenary. A died intestate leaving him surviving his widow D, his two sons B and C and 5 daughters E, F, G, H and I. At the time of A's death there was no disruption in status. It was held that the share of A should be determined as if there was a partition prior to his death and that share should again be divided between his widow and sons and daughters, in which case the sons would get a share in the father's share in addition to their own respective shares. See also *Rangu Bai v. Lakshmanlalji* ³²

8. Will by a Mitakshara coparcener—Under the Hindu Law as it obtained prior to the enactment of this Act, no coparcener could make a Will which would be valid against the other coparceners. A Hindu who has divided from the other members of the joint family can no doubt execute a valid Will in respect of his property. So also an undivided coparcener can will away his separate or self-acquired property, but as regards the ancestral or joint family property, so long as he remains a member of the family along with other coparceners, he cannot dispose of by Will his interest in the joint family property. Under section 30 of the present Act the position is different and a Will by coparcener is valid to the extent of his share in the coparcenary property.

9. Gifts and other alienations by a coparcener—It should be observed that section 6 proviso which deals with testamentary or intestate succession under this Act does not refer to alienations of property *inter vivos* by gift etc. So such transfers are governed as before by the principles and rules established as applicable to them outside this Act. Thus a gift by a coparcener will still be invalid if it is non-testamentary. So also an alienation for consideration by a coparcener of his interest in the coparcenary property is under the Act binding only upon his share except in Bengal and the United Provinces, where it will not be valid even in respect of that share. No doubt under the Dayabhaga rule in a family of brothers each brother is entitled to alienate his share because his share is definite and ascertained unlike in the case of a Mitakshara coparcenary where the interest of each coparcener is indeterminate and liable to fluctuations by births and deaths in the family so long as the family remains undivided. This position, however, stands modified with reference to the Mitakshara coparcenary when the alienation is made by the father or the manager of the joint family.

(30) 80 Mad L W 258

(31) A I R 1967 Or ss 194.

(32) 1966 Bom 169.

10. Alienation by father.—In the case of an alienation by the father be it by mortgage or be it by sale, it is valid and binding not only in respect of the father's share in the coparcenary property but also in respect of the interest of his sons if the alienation is in respect of an antecedent debt of the father which is not tainted by father's illegality or immorality. If it is so tainted, that alienation will be valid in Madras, Bombay and the Central and Southern States only against the interest of the father in the family property and not in respect of the son's interest. In Bengal and United Provinces, such alienation is not valid even as regards his share. Again, if the alienation by the father is not for an antecedent debt, the alienation as such is not binding except as regards the father's share in the States of Madras and Bombay, but the alienee will in equity be entitled to recover the amount due to him from the interest of the sons in appropriate proceedings. If a sale by the father of a coparcenary property belonging to him and his sons is set aside at the instance of the sons either on the ground that the sale is not for an antecedent debt or on the ground that the debt though antecedent is illegal or immoral, the purchaser's right may be summarised as follows

- (a) If the sale is set aside with reference to the interest of the sons on the ground that it is not for an antecedent debt, the purchaser is entitled to recover the amount proportionally due to him from the interest of the sons by suing for partial failure of consideration of the sale, getting a decree for that amount, and realising the amount due by executing the decree even against the son's interest in the joint family property
- (b) If the sale is set aside, on the ground of the debt being illegal or immoral, regarding the son's interest, then the purchaser has no equity to get any relief against the son's interest for the partial failure of consideration as he has in the previous case
- (c) In either event whether the case falls under (a) or under (b), the sale is upheld with reference to the interest of the father in the States of Madras and Bombay and Central Provinces but in other States governed by the Mitakshara, the sale is avoided *in toto*, the purchaser's right being merely to file a suit against the father and his sons for recovery of the money forming the sale consideration in case that consideration is not tainted by illegality or immorality of the father.

In the case of a mortgage by the father the position is as follows.

- (a) If it is for the discharge of an antecedent debt of the father which is not vitiated by illegality or immorality, the mortgage is upheld both as regards the father's share in the mortgaged property and the son's share in that property.
- (b) If the mortgage is not for an antecedent debt but there is no illegality or immorality vitiating it, the mortgage is upheld only as regards the father's interest in the family property except in the provinces of Bengal and United Provinces. In these two provinces the mortgage is *void in toto* and is not good even in respect of the mortgagor's share. In other provinces the mortgage is upheld as against the mortgagor's share and the mortgagee is given a right to proceed in the suit on the mortgage to realise the amount due to him in execution of the personal decree passed against the mortgagor even from the son's interests in the joint family property.

- (c) If the mortgage is for a debt which is illegal and immoral, the mortgage is upheld only against the mortgagor's interest in the coparcenary property except in the provinces of Bengal and United Provinces. In these two provinces the mortgage is avoided *in toto* and in the other provinces though the mortgage is valid against the mortgagor's share the mortgagee cannot recover the amount due to him from the son's interest in execution of the mortgage decree as he can in the previous case coming under (b).

The position is succinctly given in section 306

"An alienation by a father of the joint family property neither for family necessity nor for his antecedent debt has the same effect as that of an alienation by a coparcener who is neither a manager nor a father of a joint family and binds only his own interest in the property in provinces other than Bengal and United Provinces where even this benefit is denied to the alienee. But in such cases, if the consideration for the alienation is untainted by illegality or immorality, the creditor is entitled to invoke to his aid the son's pious obligation to pay his father's debts and recover the amount as a debt of the father by appropriate proceedings from the entire joint family property including the son's interest. There must be a personal decree against the father and not a mere mortgage decree under which the mortgaged property will have to be sold. Thus though a mortgage by the father may not be binding on the sons *qua* mortgage on the ground that it was neither for payment of antecedent debts nor for family necessity, it is open to the mortgagee, in spite of a declaration obtained by the sons that the mortgage is not binding on them, to obtain a personal decree against the father under Order 34, Rule 6 of the Code of Civil Procedure and bring the entire property including the son's interest to sale in execution of the decree, unless the sons are able to show that the debt was tainted by illegality or immorality. So also in the case of a sale by the father, which is not binding on the sons on the ground that it is neither for family necessity nor for discharge of antecedent debts, the vendee is entitled, on the sale being set aside either to the extent of the son's interest in Bombay or Madras or wholly in other provinces, to claim a refund of the consideration from the sons on the ground of their pious obligation, the reason being that the setting aside of the father's sale gives rise to a debt against the father and in favour of the alienee for failure of consideration. The pious obligation of the son to discharge the father's debt is not affected by the fact that liability is only a contingent liability arising on the father's sale being set aside, a contingency which may arise either before or after the father's death."

11. Alienation by manager—An alienation by the manager of a Mitakshara joint family by way of sale or mortgage of its property will be good as against the other coparceners either when all the coparceners have consented to the transaction or the creditor is able to show that it was supported by legal necessity or benefit of the family or that he made *bona fide* and reasonable enquiry which made him believe that such necessity existed even though no such necessity did in fact exist. *Hunooman Persaud v. Mt. Baboo*,³³ *Ramanathan v. Viswanathan*.³⁴ If the alienation is not for the necessity or benefit of the family and the alienee is not able to show that he made *bona fide* enquiry and satisfied himself that such necessity or benefit existed, the alienation, be it a sale or be it a mortgage, is not binding upon the other coparceners and is not even binding upon the manager's interest in the coparcenary property in provinces

(33) 6 M L A 393

(34) 1911 P. C. 43

other than Bengal and the United Provinces. In these two provinces the alienation is void *in toto*. In the other provinces the alienation will be upheld to the extent of the alienor's share. In case the alienation is not justified by necessity or benefit to the full extent but only partially, the position may be summarised as follows:

If the lender to or an alienee from the manager of a joint family has satisfied himself by making reasonable and *bona fide* enquiries that a necessity existed for the manager's transaction, neither the circumstances that in fact no necessity existed, nor the circumstance that the money paid by the creditor or the alienee was not utilised at all or only partially utilised for meeting the necessity, will invalidate the transaction as against the members of the family (*Sri Krishna Das v. Naik Ram.*)³⁵ As was observed by the Privy Council in *Hanooman Persaud's case*³⁶ "if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge. . . and he is not bound to see to the application of the money . . . The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have unless he enters on the management, the means of controlling and rightly directing the actual application." See also *Ram Krishna v. Ratan Chand*.³⁷ The mere fact that a part of the consideration, however small, is not substantiated by legal necessity would not necessarily nullify a deed of alienation by the manager, or show that there was no justification for its execution. The material question that has to be considered is whether the transaction itself was justified by necessity. And if on such consideration it is found that a substantial portion of the consideration was for legal necessity, that the transaction itself was justified by such necessity, that the price was not unreasonably low, that the alienee made due enquiries and acted honestly, the transaction will be upheld even though the alienee is not in a position to prove how the surplus was applied. Where it is necessary to sell property to discharge a binding legal obligation, the purchase price must occasionally exceed the actual cash requirements and unless it appears that the transaction itself is an improper one or that some more advantageous arrangement could have been made, the Courts should be slow to set aside a sale to a *bona fide* purchaser simply because the consideration paid is somewhat greater than the actual requirements (*Achutanand v. Suryanoram*).³⁸ Where enquiry is made and it is established that there is a valid necessity in respect of a substantial portion of the money raised, the presumption is that the portion not accounted for has been spent for the benefit of the family and this principle applies to a mortgage as well as to a sale; *Ambala Jana v. Gouri*,³⁹ *Histendra v. Sukhdeb*.⁴⁰ But see *Thakur Tai v. Lala Khairati*,⁴¹ holding that this principle does not apply to a mortgage; *Shudeya v. Basaprabappa*.⁴² *Purshottam v. Gangadhar*.⁴³ The decision of the Privy Council in *Sri Krishna Das v. Naik*

(35) 49 A. 149; 54 I.A. 79 25 A.L.J. 80; 1927 M.W.N. 69; 31 C.W.N. 462; 8 P.L.T. 210; 52 M.L.J. 710; 29 Bom. L.R. 815; 1927 P.C. 37.

(36) 6 M.L.A. 393.

(37) 58 I.A. 173; 53 A. 190 35 C.W.N. 641 33 Bom. L.R. 968; 61 M.L.J. 665; 1931 M.W.N. 733; 34 I.W. 175; 1931 P.C. 136 (1931) 7 A.L.J. 456

(38) 5 P. 746 1926 P. 427; 7 P.L.T. 719

(39) 44 M.L.W. 467; 1936 M. 871 1936 M.W.N. 1274

(40) 8 P. 558; 10 P.L.T. 79 1929 P. 360.

(41) 4 Luck. 107 1928 Oudh. 465

(42) I.L.R. (1939) B. 413; 41 Bom. L.R. 411; 1939 B. 901

(43) I.L.R. (1939) B. 560; 41 Bom. L.R. 931. 1939 B. 445.

Ram,⁴⁴ lays down that even where a portion of the consideration which cannot be described as small has not been proved to have been applied for legal necessity, the sale by the manager should not be set aside merely on that ground. To quote the words of the Privy Council "It would rather appear that in any case where the sale has been held to be justified but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family. This is in line with the series of decisions already referred to, in which it was held that where a purchaser acts in good faith and after due enquiry and is able to show that the sale itself was justified by legal necessity, he is under no obligation to enquire into the application of any surplus and is therefore, not bound to make repayment of such surplus to the members of the family challenging the sale." See also *Niamat Rai v. Din Dyal*,⁴⁵ which follows, *Krishna Das's case*,⁴⁶ *Rajda v. Radhika*,⁴⁷ No duty lies on the lender to see to the application of the money by the borrower. If the transaction itself is not justified by necessity or benefit, but it is found that a portion of the consideration has been spent for family purposes, then, in the Presidencies of Madras and Bombay, the transaction may be set aside at the suit of the objecting coparceners to the extent of their interest on their paying their proportionate share of the amount found to have been spent for family purposes (*Vadigalam v. Natesan*,⁴⁷ see also Section 31) and *Venkatapathi v. Pappa*)⁴⁸ If the transaction is one by way of mortgage and a portion of the consideration was utilised for family purposes, though the transaction itself was not as such justified, the security may be limited to the amount found binding. But if such transaction is one by way of sale and is not supported by family necessity and has been entered into by the manager in provinces other than Madras and Bombay, the whole transaction and not only to the extent of the interests of the objecting coparceners, should be set aside, subject of course to the equity of the alienor of his being paid the portion of the consideration found to have been spent for the family purposes (*Harij Rai v. Hans Raj*,⁴⁹ *Shanmugham v. Nagasami*);⁵⁰

12 Alienation by coparcener—The Mitakshara denies to a coparcener except when he is the sole owner (*Kanhar v. Nawab*),⁵¹ the power of disposal in respect of his undivided share and such a power is inconsistent with the strict theory of a joint and undivided family. *Suraj Buns Koer v. Shoo Proshad*⁵² But the equity of the purchaser or alienor from him induced a recognition of such a right in a coparcener in some of the Courts, and it is

(44) 49 A 149 54 I A 79; 25 A L J 80; 1927 M.W.N. 89; 31 C.W.N. 462 8 P.L.T. 210; 52 M.L.J. 720 29 Bom L.R. 825; 1927 P.C. 37

(45) 8 L.h. 597 54 I A 211 52 M.L.J. 729 29 Bom L.R. 886; 25 A.L.J. 599 1927 M.W.N. 453 8 P.L.T. 647 26 L.W. 442 1927 P.C. 121.

(46) 1943 A.L.J. 286 (P.C.)

(47) 37 M. 435; 6 I.C. 835 23 M.L.J. 256; 1912 M.W.N. 851.

(48) 51 M. 824 55 M.L.J. 489, 22 L.W. 228. 1928 M. 788 1928 M.W.N. 410.

(49) 34 P.L.R. 933 1933 L 150

(50) 54 L.W. 365 1941 M.W.N. 983. (1941) 2 M.L.J. 550.

(51) 62 L.C. 811 1921 Oudh 171.

(52) 5 C 158; 6 I A. 88 (P.C.).

now the settled law in the provinces of Madras, (*Vraswami v Ayyawami*,⁷³ *Nonjundawami v. Kanagaraju*,⁷⁴ *Ayyagari v Ayyagari*⁷⁵), Bombay (*Vasudeo v. Venkatesh*,⁷⁶ *Pakirappa v. Channappa*,⁷⁷ *Pantu v Gond*⁷⁸ *Bhu v Budha*,⁷⁹ *Gundayya v Skrinipa*,⁸⁰ *Berir (Sitaram v Laxman)*,⁸¹ and the Central Provinces (*Syed Kasim v Jorawar Singh*,⁸² *Seth Kramulady Nathu*⁸³), that one of several coparceners in a Hindu undivided Mitakshara family may, without the assent of his coparceners, sell, mortgage or otherwise alienate his share in the undivided family estate, movable or immovable, for valuable consideration (As to the quantum of the alienee's interest, see *Tinwaria v Gunwantrao*,⁸⁴ *Muthukumara v Sivanarayana*,⁸⁵ *Somu v Singara*,⁸⁶ (upholding the sale of a coparcener's interest to another coparcener) *Mt Subhati v Nokhe*,⁸⁷ But under the Mitakshara Law as administered in Bengal and the North Western Provinces (*Bal Govind v Narain Lal*,⁸⁸ *Mahindra v Sitaram*,⁸⁹ *Bhagannath v Chand*,⁹⁰ *Madho Prashad v Mehrban Singh*),⁹¹ the Punjab (*Piare v Ram*,⁹² *Ralla Ram v Atma Ram*⁹³ Bihar, Orissa and the United Provinces, (*Chandradeo v Mata Prasad*,⁹⁴ *Jowala Prasad v Maharaja Protap*,⁹⁵ *Kali Shankar v Nawab Singh*,⁹⁶ *Madho Prashad v Mehrban Singh*,⁹⁷ *Ghansey v Har Prasad*)⁹⁸, a coparcener cannot without the consent of his other coparceners (*Nabin Chandra v Shona*)⁹⁹, mortgage or sell his undivided share on his own account and not for the benefit of the family, and where he does not make such an alienation, the other coparceners are entitled to get back

- (53) 1 M H C R 471
- (54) 42 M 154, 36 M L J 242 1919 M W N. 139 9 L W 132 49 I C 666.
- (55) 25 M 690
- (56) 10 Bom H C R 139
- (57) 10 Bom. H C R. 162 (F B)
- (58) 43 B. 472 21 Bom L R 213 40 I C 765
- (59) 50 B 204 1926 B. 399 26 Bom L R 120
- (60) 38 Bom. L R 1095, 1937 B. 51.
- (61) 8 N L R 128 17 I C. 133
- (62) 50 C 84 49 I A 358 16 L W 223 43 M L J 676 25 Bom L R 1; 21 A L J 57 27 C W N 179 1922 P C 353.
- (63) 16 N. L. R. 131 56 I C 44
- (64) 1936 N. 34
- (65) 56 M 534 1913 M W N. 199 64 M L J 66 37 L W. 19; 1933 M 158
- (66) 1945 M 407
- (67) 225 I C 238
- (68) 15 A 339 20 I A 116
- (69) 16 Pat L R. 377 1935 P 349 Oudh
- (70) 14 O C 295 13 I C 466.
- (71) 18 C 157, 17 I A. 194 (P C).
- (72) 11 I C. 443.
- (73) 14 L 584, 34 P L R. 113, 1933 F., 343.
- (74) 31 A. 176, 6 A L J. 268 1 I C 47 (F. B.).
- (75) 37 I C. 184
- (76) 31 A. 507; 6 A L J 762; 3 I C. 909.
- (77) 1937 A L J 90 1937 A. 99
- (78) 35 C. W N 279; 1932 C. 25

the property sold: *Pattoo Lal v. Raghubir*⁷⁹. This includes also the purchaser who has no equity against them for the payment of the purchase money. (*Mathura Prasad v. Raj Kumar*⁸⁰ *Bal Govind v. Narayan Lal*⁸¹). But in these provinces the alienation by a member of a joint family is voidable only at the option of the other members (*Kharag Narayan v. Janki*⁸²) and cannot be impeached by the alienor himself (*Madan Lal v. Chadda*⁸³), and if the alienor becomes subsequent to the alienation, solely entitled to the entire property by right of survivorship owing to the death of his coparceners who were alive at the date of his alienation, he cannot avail himself of the right of the deceased coparceners to challenge his own alienation (*Bharat v. Jeobudh*)⁸⁴. But on the question of the coparcener's power to make a gift or will in respect of his undivided share, there is no difference of opinion between the Courts and all of them hold that he cannot dispose of his undivided interest by gift (*Baitala v. Pulicat*⁸⁵, *Kotlu v. Basu*⁸⁶, *Fai Ali v. Harikar*⁸⁷), see also *Gundappa v. Shrinivas*⁸⁸ holding that a gift by one of two coparceners of his interest to the other is valid) or will (*Lakshman v. Ramchandra*⁸⁹, *Pilla v. Tamasamma*⁹⁰, *Lalla Prasad v. Sri Mahadeoji*⁹¹, *Hari Lal v. Bai Mani*⁹², *Baishabhi v. Pushitam*⁹³, *Lakshimichand v. Anandi*⁹⁴, *Subbarami v. Ramamma*⁹⁵, *Amirthammal v. Vallimayil*)⁹⁶. Since a son who is a congenital idiot can transmit right of enjoyment in the family properties to his issue, a Will left by the father in respect of such property during the existence of such a son is invalid and does not confer any rights on the persons claiming under the will, though the consent of the other coparceners will validate it (*Venkoba v. Ranganayaki*⁹⁷, *Babu Singh v. Mt. Lal*⁹⁸, *Tagore v. Tagore*⁹⁹, *Champabas v. Raghunath*)¹⁰⁰. The will may be given effect to as a family arrangement. A fortiori a Will of family property made by all the coparceners will be valid (*Lakshmi v. Mt. Anandi*)¹⁰¹, the principle being that when they so join together, they have the entire ownership of the property as in the case of an individual absolute owner who can make a valid will (*ibid*). All the High Courts are also agreed that the undivided interest of a coparcener can be taken in execution under a judgment against him at the suit of his personal creditor provided the interest is attached during his lifetime in execution of a decree (*Deendayal v. Jugdeep Narain*¹⁰², *Lakshmin v. Ramchandra*)¹⁰³. But an attachment of a coparcener's

(79) 9 Luck. 237 1933 Ough 5.5

(80) 1921 F 447 2 P.L.T. 407 (F.B.)

(81) 15 A 339 20 I.A. 116.

(82) 16 Pat 230 1937 P 546

(83) 3 A 21 1930 A 82 1930 A.L.J. 1528

(84) 1931 A.L.J. 593 1934 A. 891

(85) 27 M. 162.

(86) 19 B. 103.

(87) 1423 N 334.

(88) 38 Bom. L.R. 1195 1937 B. 51.

(89) 5 B 48 7 I.A. 181.

(90) 8 M.H.C.R. 6

(91) 42 A. 461 18 A.L.J. 503; 58 I.C. 667

(92) 29 B. 351 7 Bom. L.R. 255

(93) 50 B. 558 1926 B 378. 28 Bom. L.R. 695.

(94) 53 I.A. 123; 48 A. 313; 24 A.L.J. 609 28 Bom. L.R. 910; 51 M.L.J. 52; 1926 M.W.N. 529; 51 C.W.N. 01; 1926 P.C. 54

(95) 43 M. 24 12 L.W. 249; 59 I.C. 81 1920 M.W.N. 529.

(96) 55 L.W. 540; I.L.R. (1942) M. 807 1942 M.W.N. 518; (1942) 2 M.L.J. 292; 1942 M. 693 (F.B.).

(97) 44 M.L.W. 483 71 M.L.J. 454; 1936 M. 967.

(98) 1933 A. 830

(99) 9 Beng L.R. 377.

(100) 1946 N.L.J. 97.

(101) 45 A. 245 1923 A. 109; 21 A.L.J. 73.

(102) 4 I.A. 247. 3 C. 198.

undivided interest after his death will not avail the decree-holder and the Court-sale does not prevail as against the surviving coparceners, who, by his death, have obtained the deceased coparcener's interest by survivorship. *Pattoo Lal v. Raghuvir* ¹⁰²

13 Liability for coparcener's debts—Under the Hindu Law governing the Mitakshara coparcenary, no coparcener nor his interest is liable to be proceeded against for the debt incurred by another coparcener. Even in respect of his own debt if the coparcener dies, the creditor is not entitled to recover the amount from the deceased coparcener's interest in the coparcenary property, unless the creditor has obtained a decree against the coparcener and attached his interest in the property prior to his death. If he has not effected such attachment, the interest of that coparcener would devolve upon the other coparceners by survivorship and the creditor would be left without a remedy for realising his monies from that coparcener's interest. By the Hindu Women's Rights to Property Act if the deceased coparcener had left his widow, since she had taken the same interest as her deceased husband in the coparcenary property under that Act, the creditor could file a suit against her and recover his dues from her interest in the property. But now under the Hindu Succession Act the Hindu Women's Rights to Property Act stands repealed. Her position however has become that of an absolute owner of the interest which she has taken in the coparcenary property. Since what she has taken is not taken in away by this Act but has been converted into an absolute interest her liability to pay the debts of her deceased husband must be considered to continue. So also if a coparcener dies after this Act leaving any of the heirs mentioned in class (1) of the Schedule to inherit his interest in the coparcenary property, such heir will be liable to pay the personal debts of the deceased coparcener since under the general law the heir is bound to pay the debts of the deceased. No doubt if the deceased coparcener has left no heir under this Act and his interest has survived to his father or other collateral coparceners like brothers, nephews or uncles, his interest is not available for realisation of his creditor's debts unless the creditor had obtained a decree against the coparcener and attached his interest in the coparcenary property prior to his death. The position may be summarised as follows:

Besides the separate property of a coparcener, his undivided interest in the coparcenary property or in any specific item thereof (*Haryas Raj v. Hans Raj* ¹⁰⁴, *Shanmugam v. Nagasami* ¹⁰⁵), can be proceeded against by his creditor for the coparcener's personal debt, when he has either attached that interest during the coparcener's lifetime in execution of a decree on the debt (*Suraj Buns v. Shoo Persad* ¹⁰⁶, *Deendayal v. Jugdeep* ¹⁰⁷) or has secured, in the Provinces of Bombay and Madras, a mortgage or charge for the debt in respect of the undivided interest (*Suraj Buns v. Shoo Persad*) ¹⁰⁸ and in either case the fact that the debt has been borrowed for an immoral purpose would not affect the availability of that interest for the satisfaction of the debt (*Vishwanath v. Prakash*) ¹⁰⁹. In the former case the attachment must be during the debtor-coparcener's lifetime, and the decree also must have been obtained before the coparcener's

(102) 9 Luck. 237 1933 Oudh. 325

(104) 34 P.L.R. 983. 1933 L. 150.

(105) 54 L.W. 365 1941 M.W.N. 985 (1941, 2 M.L.J. 550.

(106) 5 C. 140; 6 I.A. 88 (P.C.).

(107) 3 C. 198; 4 I.A. 247.

(108) 1935 A. 278; 4 A.W.R. 1483.

death (*Ramanayya v Rangappaya*,¹⁰⁹ *Muthaya v Lakshmanan*,¹¹⁰ *Kaliamo v. Marayappa*,¹¹¹ *Ragunath v Dwarkabai*,¹¹²) This rule will not apply to the claim of a widow for arrears of maintenance which accrued due during the husband's life time, since such a claim is not a mere personal claim which will die with the husband's death, but is one enforceable against the property in the hands of either the heir or the surviving coparcener. See also *Parandamaya v Veeraya*.¹¹³ But if the attachment is an attachment before judgment followed by a decree during the coparcener's lifetime and there has been no fresh attachment after decree, the Madras High Court rightly holds, on the view that in such a case no fresh attachment after decree is necessary (Civil Procedure Code, Order 38, Rule 2) that the attached undivided interest of the coparcener-debtor is available to his creditor in execution, *Sankaralinga v Official Receiver*,¹¹⁴ *Muthuswami v Chinnammol*,¹¹⁵ while the contrary view is held by the Bombay High Court (*Subrao v Mahadevi*).¹¹⁶ If the decree is followed by attachment during the coparcener's lifetime, the circumstance that the order for sale was made after his death is immaterial (*Figuri Chaud v Sant Lal*,¹¹⁷ *Suraj Bansi v Sheo Persad*,¹¹⁸ *Suraj Baksh v Thakur Das*.¹¹⁹) Where there is no such charge or attachment effected in respect of a coparcener debtor's interest during his lifetime, on his death, his undivided interest accrues to the other coparceners by virtue of their rights of survivorship, and the creditor is left without a remedy to fix that undivided interest with the liability. The above principles apply to the immoral or avyavaharika debts of the father, grandfather or great-grandfather or to the debts incurred by the manager which are not incurred for the benefit or necessity of the joint family, though if the debts of such ancestor are not avyavaharika, or if the debts of the manager are for binding purposes, the same can be realised by attachment and sale effected subsequent to his death of not only his own interest but also the interest of other coparceners who are liable to pay the debts, though in no case can the person or personal property of a coparcener be proceeded against for a debt of the manager or the father except when that coparcener is himself a party to the debt (*Jagannath v Basist*.¹²⁰ *Parandamaya v Veeraya*.¹¹³) The effect of insolvency of one of the members of the coparcenary is not to divest his share of its character as joint family property, and when, on the annulment of adjudication, that share reverts to the quondam insolvent it reverts not as his individual property but as joint family property, so that, if on the date of such reversion he is not alive, it goes not by inheritance but by survivorship, and his creditor's recourse to that share can be defeated on the ground that, there having been no attachment of that share during the insolvent's lifetime, the

(109) 17 M 144

(110) 35 M L W 1001 1931 M. W N 1015 136 I C 7 8

(111) 1945 M W N 48 (1942) 2 M L J 750 1942 M 149

(112) 43 Bom L R 772 1941 B. 357.

(113) 48 L W 905

(114) 49 M L J 616 92 I C 504 1926 M 72 1925 M W N 852.

(115) 26 M L J. 517 24 I C 320

(116) 31 B. 105 21 I C 350; 15 Bom. L R. 848

(117) 48 A 4 1926 A 157 (2) 23 A L J 877

(118) 5 C 148 6 I A 88

(119) 15 Luck 503 1940 Oudh. 200

(120) 1937 P 195

creditors' right cannot prevail as against the right of survivorship of the other coparceners *Suryanarayana-murthy v Venaraju*¹²¹ overruling *Lakshmanan v. Srinivasa*¹²²

14. Anomalies in succession under this section—While this section deals with devolution by survivorship or inheritance in the case of death of a male coparcener, there is no indication as to the devolution of the interest of the deceased coparcener which has descended to his widow under the Hindu Women's Rights to Property Act. No doubt under Section 14 her interest gets enlarged to an absolute interest with reference to her husband's share in the coparcenary. If she dies subsequent to this Act her heirs will take the property under Sections 15 and 16. The heirs mentioned in class (1) in the case of the death of a male coparcener can succeed only under this section if that coparcener dies subsequent to this Act. If the coparcener had died prior to this Act but subsequent to 1937, leaving any or some of the heirs mentioned in the Hindu Women's Rights to Property Act, they alone would have taken and not the other heirs mentioned in class (1) of the schedule to this Act. If the coparcener had died prior to 1937 there can be no question of inheritance to him because his interest would have survived under the general Hindu Law to the other coparceners in the family. The anomaly is obvious. If the coparcenary had originally consisted of 5 brothers, A, B, C, D and E and A had died prior to 1937 leaving the female heirs mentioned in class (1) or male heirs mentioned in that class claiming under such female heirs, then none of them can claim any interest in the coparcenary property. And if B had died subsequent to 1937 and prior to this Act, leaving female heirs mentioned in class (1) or male heirs mentioned in that class claiming through such female heirs then only the widow, the widowed daughter-in-law and the widowed grand-daughter-in-law amongst them would have succeeded and not the others. If C had died subsequent to this Act, all such heirs would succeed. See *Madhusoodhan v Anatha Charan Behara*¹²³.

15. Effect on the coparcenary of the death of a coparcener leaving female heirs in clause (1) of the schedule—On the death of a coparcener leaving the female heirs mentioned in class (1) of the schedule, his share in the coparcenary property becomes severed and distinct to be inherited by those heirs and that share is not subsequently subject to the fluctuations of increase or decrease due to changes in the membership strength of the coparcenary. This, however, does not affect the incidence of survivorship and other incidents of a normal coparcenary as between the other members of the coparcenary. To illustrate, if a coparcenary consists of a father A and three sons B, C and D, and A dies leaving a widow E and a daughter F, A's one-fourth share in the coparcenary property will be taken by his three sons B, C and D as well as his widow E and daughter F in equal shares, each getting one-twentieth. The sons B, C and D will continue to be coparceners with the rights of survivorship as between them and incidents of managership, etc., characteristic of a Mitakshara coparcenary. If subsequently B dies without leaving any of the heirs mentioned in class (1) of the schedule, his interest in the coparcenary properties, namely one-fourth interest will devolve by survivorship on his brothers C and D. The one twentieth share which B had taken on the death of his father in the father's share had ceased to be coparcenary property and does not devolve by survivorship. If subsequently C dies leaving a son alone or the son of a predeceased son or the son of a predeceased son of a predeceased son, that son, grandson or great-grandson as the case

(121) (1945) 1 M.L.J. 292 I.L.R. (1946) Mad 54 58 L.W. 150

(1,2) 44 M.L.W. 657. 71 M.L.J. 707 1937 M 131 I.L.R. (1937) M 203. 1536 M.W.N 1043

(123) 1963 Ori. 163

may be will take C's share not by inheritance but under the original Hindu Law of survivorship though he will be holding it jointly with D. The above would be the position if E the widow of A is not alive either when B died or when C died. If, however, E is alive when B dies there is no survivorship because his mother E is there and she being an heir under class I she inherits B's share and neither C nor D takes any interest in that property. So also when C dies leaving a son G and the mother E, there is no question of survivorship again and under the rule of inheritance both the mother E and the son G take C's share in equal shares. Similar reasoning applies when the heir left by the coparcener is not the mother but another female heir mentioned in class I of the schedule or a male heir mentioned in that class claiming through such female heir.

16 Explanation (1) of the section—While the proviso to section 6 contains the formula for fixing the share of the claimant *Explanation (1)* contains a formula for deducing the share of the deceased ¹²⁴. The interest of a coparcener shall be deemed to be a share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death irrespective of whether he was entitled to claim partition or not. If a coparcener who has left any of the female heirs mentioned in class I of the schedule leaves a will, that will operate only on the share to which he will be entitled at the time of his death if a partition had taken place at that time. The fact that the will was written some years earlier would not make that will effective on the property existing on the date of the execution of the will. This is the position under the general law itself and does not require to be specially enunciated as is done under the *Explanation*. The expression "irrespective of whether he was entitled to claim partition or not" has in contemplation cases where as in the Bombay school a son is not entitled to demand partition unless the father who is joint with his father or collaterals consents. Thus if a coparcenary consisted of a father, his brothers and two sons, and one of the sons wanted to be separated from the others, he could not get his share divided unless the father agreed to the division. It is to provide for such cases that the above expression has been employed. The result now is that whether he can claim partition or not under the general law, a coparcener can leave a will which will take effect upon his interest in the coparcenary property as if there has been a partition prior to his death (*See* Section 30 of the Act). And similarly in the absence of a will by him his heir will take the property as if it is divided at the time of the coparcener's death and there is no question of fluctuation in the interests taken by reason of subsequent death or birth in the coparcenary, if he leaves a female heir or a daughter's son mentioned in class I of the schedule. Similarly, when a coparcener dies leaving a widow, the quantum of interest which she takes is not subject to the hazards of the fluctuating fortunes of the family though factually no partition has taken place, and no curtailment of her share is permissible on the footing of a valid exercise by the father of the joint family to make a gift of reasonable portions of joint family property for permissible purposes. *Karuppa Gounder v. Palani Ammal* ¹²⁵.

The precise effect of the notional partition postulated by *Explanation 1* of the section on the rights of a coparcener's widow, in those parts of India where, under the Hindu law, at a partition in a joint family consisting of for instance, of a father F, his wife W and a son or sons, the wife cuts in for a share though she is not herself a coparcener and cannot enforce a partition, had given rise to conflicting views. The question was whether the fictional parti-

(124) *Gopud v. Hirebai*, 1978 S.C. 1239 at 1242.

(125) (1963) 1 M.L.J. 86.

tion would avail *W* to claim on her husband's death undivided from his son or sons not merely what she would take as an heir to her husband's interest but also the share she would be entitled to at the fictional partition to ascertain her husband's interest. The question has now been answered in the affirmative by the Supreme Court in *Gurupad v. Hirabai*¹²⁶. According to the Supreme Court:

In order to ascertain the share of heirs in the property of a deceased coparcener it is necessary in the very nature of things, and as the very first step to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. *Explanation 1* to section 6 resorts to the simple expedient, undoubtedly fictional, that the interest of a Hindu Mitakshara coparcener shall be deemed, to be, the share in the property that would have been allotted to him if a partition of that property had taken place immediately before his death. The *Explanation* compels the assumption of a fiction that in fact a partition had taken place the point of time of the partition being the one immediately before the death of the person in whose property the heirs claim a share. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption once made, is irrevocable. One cannot go back on that assumption and ascertain the share of the heirs without reference to it.

All the consequences which flow from a real partition have to be logically worked out which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition.

Where a person died undivided leaving sons and daughters the daughters not only get a share of their father's undivided interest but also by virtue of *Explanation (1)* their shares will be deemed to have been notionally ascertained at the time of the father's death. The eldest son cannot as karta of the family represent the daughters in suits or other transactions.¹²⁷ All the heirs taking by virtue of *Explanation I* take per capita as tenant-in-common.¹²⁸

17. Explanation (2) of the section.—This *Explanation* restricts the scope of the proviso and says that nothing in the proviso shall be construed as enabling a person

(126) 1978 SC. 1239, approving *Sushilaben v. Ramchandra*, 157 Bom. 57 (F.B.), *Pedoban v. Jagdish Chandra* 1974 Guj. 23; *Ananda v. Hariharadas*, 1967 Orissa 194; *Rangubai v. Laxman*, 1966 Bom. 169; *Bhagwan v. Vishwanath*, 1979 Bom. 1. See also Derrett: Hindu Succession Act, S. 6. A Reappraisal of *Rangubai v. Laxman*, (1978) 1 S.C.J. (Journal) p. 64 c.f., *Analaben v. Parashanna*, (1970) 2 Mys. L.J. 571.

(127) *Jagdish v. Ram Kishan*, 1975 M.P.L.J. 223 cf. *Coramgram v. Chetmal*, 1970 Bom. 251. See also *Bharat Trading (International) Ltd. v. Nachar Ammal*, (1976) 2 M.L.J. 414 89 L.W. 482 (he cannot contract debts as to bind the female members).

(128) *Bharat Trading (International) Ltd. v. Nachar Ammal*, *supra*.

who has separated himself from the coparcenary before the death of the deceased, or any of his heirs, to claim on intestacy a share in the interest referred to therein. This position may be illustrated as follows. A coparcenary consists of father *A* and three sons *B*, *C* and *D*. *B* separates himself from the coparcenary and takes away his share. Subsequently *A* dies, leaving a widow and the sons above-mentioned. The share of *A* is taken by his widow and *C* and *D* not by *B* also as he had become separated before the death of *A*. The position will be the same if at the time of *A*'s death *B* is not alive but has left any of the heirs mentioned in class 1 of the schedule and such an heir claims to take a share in the interest left by *A*. What *B* cannot claim if he were alive on the death of *A*, neither his heirs can claim. Supposing in this illustration *B* has a son *E*, and *B* alone has separated leaving *A*, *C*, *D* and *E* joint and *A* dies leaving a widow, even here *B*'s son *E* cannot claim a share along with *C* and *D* because he is not one of the heirs mentioned in class 1. If *B* were not alive at the time of *A*'s death, even then *B* having separated and the proviso applying by reason of *A* having left a widow, *B*'s son *E* cannot take any interest in the share of *A* because he is an heir of the predeceased son who is separated from *A*. It should be observed that *Explanation* (2) deals only with a claim on intestacy and there is nothing to prevent the father leaving a will giving his entire property to the divided son or to the heir of the divided son or even to a stranger. The whole object of this section read with the *Explanation* is only this. That if a coparcener has any of the relations mentioned in class 1 of the schedule, he will be considered to have held his interest as separate property at the time of his death which will descend to his heirs under the Act and over which he has the power of testamentary disposition. It should be remembered that this notion of absolute property of coparcener in respect of his interest in the coparcenary property is permissible only when he has female heirs mentioned in class 1 or male heirs mentioned in that class claiming through such female heirs. Even here the point of time relevant for consideration is the death of the coparcener, and this consideration has no place except when the question of inheritance to the deceased coparcener arises or when the question of disposition by will by him has to be decided. The point of time being the death of the coparcener and the relevancy of that time being with reference to question of inheritance or testamentary disposition, there is no scope for any contention that the coparcener should be considered divided before that point of time so as to enable him to alienate his properties *inter vivos* and if he is an absolute owner of his share. Supposing he does make an alienation *inter vivos*, it will be open to his other coparceners to question that alienation *in toto* in the Provinces of Bengal and United Provinces and with reference to the interest of the other coparceners in the Southern Provinces. A difficult question may arise in a case where a gift is made by a coparcener and he dies subsequently. Will his heirs under this Act be bound by that transaction or are they entitled to impeach the same on the ground that the alienation by the coparcener was void during the coparcener's lifetime and should be considered so even afterwards? If the deceased has left a son, or a son's son or a son's son's son the gift is not binding on him because under the general law, the other coparceners of the father can impugn the transaction. If the deceased coparcener has left a male descendant, he will only be bound by the father's transaction if it is for an antecedent debt not vitiated by illegality or immorality and not when it is a gift. But if the deceased has left along with a son a female heir mentioned in class 1 or such a female heir alone, since the alienation is void and the heir takes it under the Act it is possible to contend that the heir can impugn the transaction. There is, however, another principle well-known and established in practically every jurisprudence, namely, that the heir cannot disaffirm a transaction of the deceased unless the ground of attack is open to the deceased himself if alive. Under this principle it may be contended that the heirs taking the property of a coparcener under the

proviso to this section are not entitled to disown or repudiate an alienation made by the deceased coparcener because their position is the same as that of the heirs succeeding in the case of a non-Hindu.

Explanation (2) should be confined only to those cases where a coparcener has gone out by his voluntary act and cannot be extended to a case where by operation of law certain persons become entitled to a share in the joint family property of a deceased coparcener. Thus where a widow of an undivided coparcener is entitled by virtue of schedule I to the Act to a share in her father-in-law's property and not claiming through her predeceased husband, her claim is not defeated merely because she has filed a suit for partition and possession of her share in her husband's interest in coparcenary property against her father-in-law before his death.¹²⁹ *Explanation (2)* does not prevent a divided son from claiming succession on intestacy if there is no person on whom his father's property can devolve by survivorship.¹³⁰ In regard to property obtained by a propositus as his share on partition of joint family properties, a divided son will succeed as heir along with his widow, daughters and mother. Section 6 does not apply to the devolution of such property and the divided son will not be excluded from succession under the *Explanation 11*.¹³¹

7 Devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru or illom.—(1) When a Hindu to whom the *marumakkattayam* or *nambudri* law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an interest in the property of a *tarwad*, *tavazhi* or *illom*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the *marumakkattayam* or *nambudri* law.

Explanation.—For the purposes of this sub-section, the interest of a Hindu in the property of a *tarwad*, *tavazhi* or *illom* shall be deemed to be the share in the property of the *tarwad*, *tavazhi* or *illom*, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *tarwad*, *tavazhi* or *illom*, as the case may be, then living, whether he or she was entitled to claim such partition or not under the *marumakkattayam* or *nambudri* law applicable to him or her, and such share shall be deemed to have been allotted to him or her absolutely.

(2) When a Hindu to whom the *alyasattana* law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an undivided interest in the property of a *kutumba* or *kavaru* as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the *alyasattana* law.

Explanation.—For the purposes of this sub-section, the interest of a Hindu in the property of a *kutumba* or *kavaru* shall be deemed to be the share in the property of the *kutumba* or *kavaru* as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *kutumba* or

(129) *Shinji Rao v. Rukmalamma*, 1975 Mysore 113.

(130) *Appalanaidu v. Narayanaswami*, (1972) 1 A.W.R. 306. 1972 A.F. 258.

(131) *Thiruparamadurai Ammal v. Srinivasan Pillai*, (1972) 2 M.L.J. 72; 1972 Mad. 264 64A.

karyam, as the case may be, then living, whether he or she was entitled to claim such partition or not under the *aliyasantana* law and such share shall be deemed to have been allotted to him or her absolutely.

(3) Notwithstanding anything contained in sub-section (1), when a *sthanamdar* dies after commencement of this Act, the *sthanam* property held by him shall devolve upon the members of the family to which the *sthanamdar* belonged and the heirs of the *sthanamdar* as if the *sthanam* property had been divided *per capita* immediately before the death of the *sthanamdar* among himself and all the members of his family then living, and the shares falling to the members of his family and the heirs of the *sthanamdar* shall be held by them as their separate property.

Explanation—For the purposes of this sub-section, the family of a *sthanamdar* shall include every branch of that family, whether divided or undivided, the male members of which would have been entitled by any custom or usage to succeed to the position of *sthanamdar* if this Act had not been passed.

SECTION 7—SYNOPSIS

- | | |
|--|---|
| 1. Scope. | 4 Will by a member of a tarwad, etc. |
| 2. Devolution under this Act in cases previously governed by Marumakkattayam Law | 5. Other incidents governing the father |
| 3. Aliyasantana Law | 6. <i>Sthanam</i> |

1 **Scope**—This section is designed to apply the principles of the previous section to cases where the *Marumakkattayam* or *Aliyasantana* or *Nambudri* law would have applied if this Act had not been passed. The first sub-section provides that in the case of a person governed by the *Marumakkattayam* or *Nambudri* law dying after the commencement of this Act, leaving an interest in the property of a tarwad, tavazhi or illom as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession under this Act and not according to the *Marumakkattayam* or *Nambudri* law. The *Explanation* to the first sub-section corresponds to *Explanation* (1) of the previous section. Under section 7 (1) the interest of a deceased member in the property of a tarwad would devolve under this Act and the heirs under the Act cannot form a tarwad with the rest of the members. The wife and children of a deceased member or karnavan cannot coalesce with the surviving members of the tarwad so as to constitute the resulting entity into a tarwad. They will be in the position of co-owners with the rest of the members of the tarwad. A suit for possession by one coher against the other members would not be maintainable.¹²⁸ The second sub-section deals with the *Aliyasantana* Law and applies the same principle as in the case governed by the *Marumakkattayam* Law under the previous sub-section and the *Explanation* to sub-section (2) corresponds to the *Explanation* to sub-section (1). The 3rd sub-section provides for devolution of *sthanam* property held by the *sthanamdar* on his death, and the *Explanation* to that sub-section provides that the family of the *sthanamdar* shall include every branch of that family, whether divided or undivided the male members of which would have been entitled by any custom or usage to succeed to the position of *sthanamdar* if this Act had not been passed.

2 **Devolution under this Act in cases previously governed by Marumakkattayam Law**.—On the West Coast, in the tracts known as Malabar and Canara two kindred

(132) *Deaki v. Kumeran*, 1977 Kar, 110.

systems of inheritance known as Marumakkattayam and Aliyasantana are obtaining in which descent is traced in the female line both the said words meaning inheritance to the sister's son. Another peculiar institution common to these systems is that of the tarwad which consists of a group of persons forming a joint family with community of property, such a group being descended in the female line from a common ancestress. The essential features of a tarwad are: (i) The impartibility of the joint estate except by the conjoint will of all its constituent members, (ii) Non-recognition of marriage as a legal institution; (iii) Descent being traced through females, (iv) The management being vested in the senior-most member, the others having only the right to maintenance, and (v) Exclusion from membership of the issue of the male members of the tarwad. Thus in the case of a woman belonging to a tarwad, all her daughters and sons and all the descendants, whether male or female, of such daughters in the female line, will belong to that tarwad, but the descendants, whether male or female whether in the male or in the female line, of her sons cannot claim to be members of the tarwad (*Pakkaran v. Pathumma*).¹³³ Hence the daughter's daughters and daughter's sons of a lady are within the fold of her tarwad; her son's sons or son's daughters cannot claim to be its members, but belong to the tarwad of their mother, namely, the son's wife. In other words, a tarwad consists of females, their female descendants in the female line, the sons of such females and of such female descendants, and the sons of the deceased female members of the tarwad. A tarwad may consist of several tavazhis. A tavazhi means the group of persons consisting of a female, her children and all her descendants in the female line (*Moithyan v. Pathiapurayil*).¹³⁴ Thus some of the female members of a tarwad may each have a tavazhi of her own. Thus when a tarwad consists of a brother and his sisters, one of the sisters with her children and all her descendants in the female line constitute her tavazhi as distinct from the tavazhi of another sister, consisting of herself, her children, and all her descendants in the female line. Thus in one sense a tarwad is a larger tavazhi, because even a tarwad consists of members who trace their descent through the female line from a common ancestress. But there is one essential distinction between a tarwad and a tavazhi, and that is while possession of property is not a necessary condition of a tavazhi, the existence of community of property is an essential incident of tarwad relationship. Tarwad in other words is a distinct social unit having a corporate existence dealing as such with the outside world, but a tavazhi is only a minor member of that unit having no recognised status apart from that unit in respect of the common property of the tarwad. But a tavazhi may have its own separate property as distinct from the property of the tarwad and hold and enjoy it to the exclusion of the other members of the tarwad who do not belong to that tavazhi (*Ambu Nar v. Utha Amma*).¹³⁵ In other words a tavazhi when it has separate property of its own, is in the position of a tarwad within the tarwad in the same way as there can be a coparcenary within a coparcenary under the Mitakshara School. Like the Hindu coparcenary the tarwad or the tavazhi is a creature of law and cannot be created by act of parties (*Moithyan v. Pathiapurayil*).¹³⁶ There cannot be a tavazhi consisting of a woman and only some of her children, and such a corporate unit being unknown to Hindu Law, it is not open to a person to create such a corporate unit. (*Moithyan v. Pathiapurayil*).¹³⁶ Even marriage does not transplant a woman from the tarwad of her mother into the tarwad of her husband. In other words, the ordinary incident of a

(133) 1930 M. 922.

(134) 25 L.W. 491 at 493 51 M. 574 1928 M.W.N. 331. 55 M.L.J. 208; 1928 M. 870.

(135) 1937 M.W.N. 1254; 1938 M. 702.

Hindu marriage by which a woman on marriage ceases to be a member of her parents' family and acquires the status of a member in the husband's family does not apply in the case of marriages among women governed by the Marumakkattayam Law, and a woman in spite of her marriage remains a member of the tarwad of her birth with the rights of residence and maintenance therein unaffected. The only means by which strangers can be made members of a tarwad is by adoption, but this can be resorted to only when the tarwad is threatened with extinction and the consent of all the members is obtained (*Thathamangalath v. Krishna*;¹³⁶ *Yasudhan v. Secretary of State*,¹³⁷ *Ramon Menon v. Ramon Menon*¹³⁸). The incidents of the Marumakkattayam system differ from those of the Aliyasantana system in only some very minor particulars, these being:

(i) While under the Marumakkattayam Law, the eldest male is the karnavan or manager of the tarwad, under the Aliyasantana law, the eldest member of the tarwad, whether male or female, is entitled to be the manager.

(ii) While under the former system, the separate property of a male member is on his death taken by his tarwad (*Govindan v. Sankaran*)¹³⁹ under the latter system it goes to his nearest heirs (*Antamma v. Kaperi*).¹⁴⁰

(iii) While under the former system the females generally reside in their own tarwads, in the latter they usually reside in the tarwads of their husbands.

(iv) While inter-caste marriages in the former system are common and not disapproved, such marriages in the latter system invite an amount of disapprobation and censure as being mere illicit relationships though not involving degradation or ex-communication, and

(v) While Marumakkattayam system is followed by all castes, the Aliyasantana system is not followed by the Brahmins (P.R. Sundara Iyer's *Malabar and Aliyasantana Law*, 1922 Edn., p. 247).

Under sub-section (1) of this section every member of the tarwad, tavazhi or illom, whether male or female, will be considered to have died separated with a share that would have fallen to him or her if a partition were to take place prior to his or her death amongst the members of the tarwad, tavazhi or illom. If he or she has left a will in respect of such share, the same would be valid with reference to that share, and if he or she had died after this Act, the share that she or he would have taken had there been a partition immediately before his or her death, would be taken by his or her heirs under this Act. It would be seen that the doctrine of survivorship which is allowed to continue even after this Act in a Mitakshara coparcenary, though under stated conditions, has no place in the matter of succession to the interest of a member of a tarwad, tavazhi, or illom who dies after the commencement of this Act. The inheritance to a male member with reference to his share would be governed by Sections 8 to 13 and the inheritance to a female member will be governed by Sections 14 to 17 subject to the special provision in Section 17.

(136) 39 L.W. 370-37 M.L.J. 511; 1934 M. 286.

(137) 11 M. 157.

(138) 24 M. 73. 27 I.A. 251; 4 C.W.N. 310; 10 M.L.J. 245.

(139) 32 M. 351; 2 L.C. 183; 19 M.L.J. 350 (F.B.).

(140) 7 M. 573.

Where the office of trustee of a temple and its properties forming the subject of a private trust created by a tarwad was not a bare office of honour but one coupled with certain entitlements and material benefits, it has to devolve in accordance with the provisions of Section 7, in the absence of prescription of the line of succession by the founder.¹⁴¹

3. Aliyasantana Law.—The rules applicable to Marumakkattayam law as modified by this Act in Section 7 (1) are *pro tanto* applicable to persons governed by the Aliyasantana law which, as has been already stated, is largely based on the same principles as the Marumakkattayam system. The obvious intention of the Legislature is that whatever might have been the law with reference to succession before the enactment of this Act, there should be only one uniform code of succession subject to the minimum number of exceptions necessitated by the stubbornness of the customs and usages of persons governed by the Marumakkattayam, Nambudri or Aliyasantana law. It would have been far better if even these exceptional exceptions had not been embodied in the statute. But it is gratifying to notice that the main principles of devolution by inheritance or testamentary disposition are practically the same in respect of all the systems which are in vogue in Southern India.

Under Section 7 (2) persons who could not have been heirs of the deceased under Aliyasantana law have been treated as heirs of the deceased and they succeed to his or her share in the family property as if it had been allotted to him absolutely. The result is that the family property becomes the subject of ownership of members of the family and some others not considered as members of the family by the Aliyasantana law; none of them can claim exclusive possession of the property commonly owned to the detriment of others; the manager of the joint family though he can exercise his powers as manager in respect of the interest of the surviving members of the family in the family property would not be entitled to claim the same right in respect of the share inherited by the heirs of a deceased member under Section 7 (2) or the proviso to Section 6 and the heirs would hold the property as tenants-in-common without accepting the supremacy of the manager over the share inherited by them.¹⁴²

4. Will by a member of a tarwad, etc.—In the case of a tarwad of tavazhi or kutumba as in the case of a Mitakshara coparcenary, there is no right in a member thereof to dispose of his interest in the family property by a will. It may happen that all the other members in the kutumba have died and the entire property has survived to one person. In such a case, of course, being the sole owner of the entire property, there can be no denying of his or her right to dispose of it off in any way he or she likes by a will. But so long as there are other members in the tarwad, family or kutumba, the right of a member to will away his share in the family property has not been conceded. So when a member of a Mitakshara coparcenary who had never enjoyed this right of testamentary disposition was accorded the same under this Act, it stood to reason that the members of a tarwad or kutumba, the incidents of which are practically similar to and mainly identical with those governed by the Mitakshara law, should get the same principles of law made applicable to them also. Hence is the right to will away the property in the case of a member of a tarwad, tavazhi, illom, kutumba or kavaru placed on the same footing as the right of testamentary disposition in the case of a member of Mitakshara coparcenary.

(141) *Parameswaram Pillai v. Sitabang Pillai*, (1978) 2 M.L.J. 19.

(142) *Channamma Hegde v. Raghu Reddy*, (1973) 2 Mys. L.J. 371.

5. **Other incidents governing the tarwad**—Except to the extent expressly modified or altered by necessary implication under the provisions of this enactment with reference to testamentary disposition and intestate succession, the other incidents previously applicable to the Malabar and Canarese families, remain affected by this enactment. Such questions as may relate to the management of the tarwad properties, the right to alienate them, the power of incurring debts, claim to partition, etc., have to be considered with reference to the law as modified by this enactment.

6. **Sthanam.**—Sthanams had emerged as grants in days of old to rulers or chieftains with a view to enable them to maintain their pre-eminence in social status by pomp and splendour amongst those over whom they ruled but other families noted for their opulence and prosperity had begun to emulate these rulers and had such offices attached to their families and settled properties on those sthanams. But these sthanams carried with them little or no dignity worth mentioning, apart from some kind of a feeling of self elation or elevation nourished in the minds of the sthanam-holders. The holder of the office—the sthanam—was solely entitled to the property during his lifetime. The seniormost member of a tarwad usually became the sthanamdar of the sthanam attached to that tarwad. On his succession to the sthanam he stood separated from the rest of the family. He solely became entitled to the sthanam property but he gave up his right in the tarwad property. All the same he and the members of his tarwad had the same right of succession to the properties of each other as if his severance from the family had been the result not of his succession to the sthanam, but a voluntary division between him and the rest of the family.¹⁴³ With respect to the sthanam properties, provision is made in Section 7 for the breaking up of the sthanam on the death of the sthanamdar. The family of the sthanamdar is defined as inclusive of every branch of that family, whether divided or undivided, the male members of which would have been entitled by any custom or usage to the position of sthanamdar. Sub-section (3) provides an exception to the rule enunciated in sub-Section (1) and says that, when a sthanamdar dies after the commencement of this Act, the sthanam properties held by him shall devolve upon the members of the family to which the sthanamdar belonged and the heirs of sthanamdar as if the sthanam properties had been divided *per capita* a split second before the death of the sthanamdar among himself and all the members of his family then living and the shares falling to the members of the family and the heirs of the sthanamdar shall be held by them as their separate property. Once the sthanam has thus been broken up and the properties attached to the sthanam have been divided and taken by the members of the family as above indicated, each member becomes a fresh stock of descent and the heirship to the property inherited by such member will be determined under this Act.

Under sub-Section (3) on the death of the sthanamdar after the Act came into force, each of the members of his tarwad took a *per capita* share in the sthanam property as co-owners and not as his heirs. The personal heirs of the deceased took the share which the deceased was deemed to have got as his share at the moment of his death.¹⁴⁴ The legal fiction in sub-Section (3) does not cut down the sthanam property that passes on the death of a sthanamdar to a *per capita* share, the fiction having been introduced only for determining the

(143) *Kochunas v State of Madras*, 1960 S-C 1080; *M.E.B. Menon v. A.C. Estate Duty*, 1971 S.C. 2392 & 2393-94

(144) *Asst Commissioner, A.I.T. and S.T. v. Ramuni*, (1972) 2 S.C.J. 530 1971 S.C. 2513.

respective shares for the purpose of distribution to the members of the family and the heirs of the sthanamdar. The legal fiction could not be extended further so as to include an actual division or partition having been effected in the lifetime of the sthanamdar with the result that he became a divided member for all purposes¹⁴⁴.

8 General rules of succession in the case of males.—The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:—

- (a) firstly, upon the heirs, being relatives specified in class I of the Schedule;
- (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased

SECTION 8—SYNOPSIS

- | | |
|------------------------|----------------------|
| 1. Prior Law. | 3. Secondary heirs. |
| 1-a Scope of Section 8 | 4. Agnatic relations |
| 2 Primary heirs. | 5. Cognates |

1. Prior Law—Formerly, under the Mitakshara, propinquity being the test of heirship, the heirs were classified under three heads: sapindas, samanodakas and bandhus. Sapindas are the six agnatic relations in the male line whether ascending or descending, the wives of the six paternal ancestors in the male line, the six male descendants in the collateral line of each of the six paternal ancestors and the widow, daughter and daughter's son, in all 57 in number. The samanodakas of a person are his agnatic male relations in the ascending or descending line from the 7th to 13th degree, the male descendants in the male line up to the 13th degree of each of those ascendants, and the male descendants in the male collateral line from 7th to 13th degree of the agnatic descendants up to the 6th degree, in all 147 in number. A bandhu is a sapinda related to the propositus through one or more female links, either directly or through a common ancestor, paternal or maternal, and these bandhus are ascertained according to the rules of a confused and complicated character with reference to marriage. A bandhu is thus a cognate relation and comes in the order of succession only after the technical sapindas and samanodakas.

Under the Dayabhaga there are three classes of heirs, (1) sapindas, (2) sakulyas and (3) samanodakas. This classification is based upon the significance of certain offerings to the ancestors at the ceremony called the *parvana Shradh*. This is the shradh performed during each conjunction of the Sun and the Moon when certain oblations are presented to the deceased ancestors in the shape of *pindas* *pinda*, *lepas* and *udaka* or water. Pindas are the entire balls of food addressed to the father, father's father, father's father's father, their respective wives and the mother's father, mother's father's father and mother's father's father's father. *Pinda lepas* are the remnants of those balls of pindas which are offered to the paternal ancestors from the fourth to the 6th degree. *Udaka* or water is then offered to the agnatic ascendants

from the 7th to the 13th degree, that is seven ancestors above the remotest ancestor to whom *pinda* *lepa* is offered. The sapinda relationship arises out of the capacity to benefit by the offering of the pinda, the sakulya relationship out of the capacity to benefit by the offering of the *pinda lepa* and the samanodaka relationship out of the capacity to benefit by the offering of the *udaka*. Any one of these relationships may arise in one of three ways: 1. by offer, 2. by acceptance, and 3. by participation. A Hindu is said to participate in the benefit of oblations tendered to those ancestors to whom he himself is bound to offer them. Thus he who is bound to offer pinda to the deceased, he to whom the deceased was bound to offer pinda during his lifetime and he who is bound offer pinda to one to whom the deceased himself is bound to offer it if alive, are all sapindas of the deceased. In the same way the sakulya relationship and the samanodaka relationship arise. Among these three groups of relations, the sapindas exclude the sakulyas and the sakulyas exclude the samanodakas. The following rules determine precedence among the sapindas:

- (i) Those who offer to the propositus or to his paternal ancestors, and such paternal ancestors, exclude his maternal ancestors and those who offer only to the maternal ancestors.
- (ii) An ancestor takes before his descendants in the collateral line.
- (iii) Those who offer paternal offerings or first maternal offerings to the propositus exclude those who offer them to ancestors.
- (iv) Those who make paternal offerings and first maternal offerings to a nearer ancestor exclude those who make them to a remoter ancestor.
- (v) Those who make paternal offerings exclude those who make maternal offerings.
- (vi) Those who make 2nd and 3rd maternal offerings to the propositus exclude those who make them to ancestors.
- (vii) Those who make 2nd and 3rd maternal offerings to a nearer ancestor exclude those who make them to a remoter ancestor.
- (viii) Those who make nearer paternal offerings to the same ancestor exclude those who make remoter paternal offerings.

In the Bombay Presidency, by reason of the term "sapinda," in Manu's text being construed as "sapinda, male or female," a number of females have been let in as heirs either as gotraja sapindas, widows of such sapindas, or bandhus. The female gotraja sapindas are the females born in the gotra, or family, and these are the daughter, the sister, father's sister, son's daughter and daughter's daughter. These take the property absolutely, and when two, or more daughters, sisters, etc., inherit together, they take as tenants-in-common, and not as joint tenants with rights of survivorship *inter se*. The widows of gotraja sapindas are the widows of the sapindas and samanodakas of the deceased, such as 1. son's widow, 2. brother's widow, 3. mother, 4. step-mother, etc. These are the females who are related to the family of the propositus by marriage. A widow of a gotraja sapinda can succeed only (i) if she has not re-married, (ii) after the sister and (iii) only if there is no qualified male gotraja sapinda within 7 degrees from the common ancestor in the line to which her husband belonged. When these conditions are satisfied she will succeed in the place occupied by her husband, that is, she will succeed only if there is no widow of a nearer gotraja sapinda, either in the same line or in a nearer line. The nature of the estate that a widow of a gotraja sapinda takes depends

inherits to a male or to a female; if she inherits to a male she takes a limited estate, but if to a female, an absolute estate. The female bandhus are the daughters of descendants, ascendants and collaterals up to the 5th degree and the test to be applied in ascertaining their order of succession is the test of nearness of blood.

The texts expressly mention the following females as heirs to a male, namely, widow daughter, mother, father's mother and father's father's mother. All these come under the class of sapindas and are recognised as heirs in all the schools. In addition to these, the widowed daughter-in-law and the widowed granddaughter-in-law were brought in as heirs under all the schools by the Hindu Women's Rights to Property Act of 1937, and the sister, son's daughter and daughter's daughter were brought in among the sapindas as statutory heirs in provinces governed by the Mitakshara school as a result of the Hindu law of Inheritance (Amendment) Act of 1929. Besides these, the Madras school recognised as heritable female bandhus the brother's daughter, sister's daughter, and, father's sister, and the Bombay school brought in a large number of females as heirs under the designation of female gotraja sapindas and widows of gotraja sapindas as already seen.

The Hindu Law of Inheritance (Amendment) Act (II of 1929) introduced four more persons in the order of succession among sapindas, these being the son's daughter, daughter's daughter, sister and sister's son. These heirs in the order here given were entitled to rank in the order of succession next after the father's father and before a father's brother. The term 'sister' includes a half-sister. In addition to the above, the Hindu Women's Rights to Property Act, 1937, introduced two more heirs, namely, the widow of a predeceased son and the widow of a predeceased son of a predeceased son, and under that Act, these two widows succeeded along with the sons and widows of the propositus.

In the absence of relation above-mentioned, the preceptor, the pupil and the fellow student in respect of religious instruction, inherited in the order in which they are here mentioned (*Sambharam v Secretary of State*)¹⁴⁶ and where none of these existed, the property escheated to the Crown. *Collector of Masulipatam v Gopaly Venkata*¹⁴⁷, *Girdhari Lal v. Bengal Government*)¹⁴⁸.

As to the ascertainment of the heirs on the death of a woman who died after the Act and who had inherited a woman's estate from her husband or father who died prior to the Act in accordance with *Dutt Chand v. Mt Anarkali*,¹⁴⁹ the answer should be that if the woman who had inherited to a qualified estate had not become the absolute owner of the property by her not being in possession of the same after the Act, then the persons entitled to recover and succeed to that property are only the heirs ascertained under the Hindu Succession Act of 1956 and not the heirs under the old Hindu Law. The view of the Patna High Court in *Renukabala v. Anwar Kumar*¹⁵⁰, that in such a case the heirs entitled to succeed on the death of the woman are the heirs as ascertained under the old Hindu Law and not under

(146) 44 M. 704.

(147) 8 M.L.A. 500

(148) 12 M.L.A. 448.

(149) 73 I.A. 187; (1946) 2 M.L.J. 290; I.L.R. (1946) All. 748.

(150) 1961 Pat. 498.

the new Succession Act of 1956, is unacceptable. The contrary view, viz., that in such a case, it is the new Hindu Succession Act that applies to govern the ascertainment of the heirs and not the old Hindu Law, has been held in *Kuldip Singh v. Karnail Singh*¹⁵¹ following the earlier rulings of the Punjab High Court. It is submitted that the latter view is to be preferred as it is in conformity with the decisions of the Privy Council and the other rulings of the various High Courts in India following it.¹⁵²

I-A Scope—Under this section of the Hindu Succession Act, 1956, the entire law of intestate succession amongst the Hindus to whichever school they may belong has been thoroughly changed and overhauled on the basis of propinquity and affection, and wherever this test as between two relations cannot give a clear answer both of them have been taken as simultaneous heirs.¹⁵³ There are four classes of heirs laid down by this section: (a) The heirs coming under Class I of the Schedule. (b) Heirs coming under Class II of the Schedule. (c) The agnates of the deceased who do not come under any of the first two classes. (d) The cognates of the deceased who do not come under any of the above classes. A person in each of the above four classes above-mentioned succeeds only if there is no one in any of the previous classes. "Dying intestate" occurring in this section are words of mere description indicating the status of the deceased and have no reference to the time of death. It means in the case of intestacy.¹⁵⁴

There is nothing in the Act to divest the properties from those in whom they had become vested on the opening of the succession before the Act. For instance, if the properties had vested in the sons of a Hindu on the latter's death before the Act, the fact that under the Act the daughters also would succeed along with the sons does not enable the daughters to claim a share in the properties which had vested in the sons. *Rani Devi v. Paramanand*.¹⁵⁵

The accepted position under the Hindu Law is that where a limited owner succeeds to an estate, the succession to her estate on her death will have to be decided on the basis that the last full owner died on that day. It is as if the last full owner had lived up to and died on the death of the limited owner. A necessary corollary is that the law as then in force will govern the succession. So where the limited owner died after the commencement of the Hindu Succession Act, the provisions of that Act must apply. If the limited owner had parted with the inherited estate, for instance by gift, and was not in possession when the Act came into force the reversioners (the nearest heirs of the last full owner under Section 8 of the Act) could recover possession on her death. It however the limited owner had been

(151) 1961 Punj 573

(152) See *Daya Singh v. Dhan Kaur*, (1974) 2 S C J 145 1974 SC 663, cf. *Fatah Bibi v. Chorani Dass*, (1970) 2 S C J 629 1970 SC 782.

(153) *Arunachalathammal v. Ravi Chandran Pillai*, (1963) 1 M L J 254; 1 L R (1963) Mad. 778; 1963 Mad 255

(154) *Daya Singh v. Dhan Kaur*, supra, *Satyannarayana v. Sretamma*, 1972 Mys 247; *Shanmugasundarathammal v. Narayana Kumar*, (1972) 2 M L J 336 85 L W 670, *Manikammal v. Venkat Subba Rao*, (1978) 2 An W R, 18 (1978) 1 An L T 274

(155) 1961 Raj L W. 240

in possession of the inherited estate she would become the full owner thereof under Section 14 of the Act and on her death it will pass to her own heir under the Act.¹⁵⁶

A man may die prior to the date of the Act but succession to his estate may open only after the Act if in between there are one or more female heirs *Ratnakumar v Sunder Lal*.¹⁵⁷

This section applies to the properties of a male Hindu and does not govern his interest in a Mitakshara coparcenary property (*Shivraj Singh v Mat Munia*),¹⁵⁸ and is not retrospective. The section applies to every case of a Hindu dying intestate leaving no one on whom the property can devolve by survivorship.¹⁵⁹ Property not covered by a will will devolve in accordance with this section.¹⁶⁰ A person claiming by succession has to prove that the deceased to whom he succeeded died intestate. If there is a will the person claiming title by succession has to prove his allegation that the will is not effective.¹⁶¹ The section read with the Schedule makes no distinction between the ancestral or non-ancestral nature of the property or as to wherefrom or how the deceased got it.¹⁶² Where a father and son had divided the family business and were running it as a partnership, on the death of the father intestate, the amount standing to the credit of the father devolves on his son in his individual capacity and not as an undivided family consisting of himself and his sons.¹⁶³

2. Primary heirs.—The Schedule to this Act mentions the first two classes of heirs who are to take the property of a deceased. The first class of heirs may be called primary heirs and these are four in number, namely, the son, the daughter, the widow and the mother, and they all share equally and simultaneously. If, however, a son had predeceased the father the son's widow and his sons and daughters will take the share which would have gone to the deceased son equally between themselves. Similarly, if a daughter had predeceased the father her son and daughter would take the share of the deceased equally between themselves. If, again, both a son and his son had predeceased the intestate, the widow of the predeceased son of the predeceased son, the son of the predeceased son of the predeceased son, and the daughter of the predeceased son of the predeceased son will take the share that would have fallen to that branch equally. All the heirs mentioned in the preceding paragraph are put in Class I as the first preferential heirs, their total number being 12. But grandsons, granddaughters and great-grandsons come in under the doctrine of representation only in the absence of their parents and it is therefore unlikely that in any case all the 12 heirs will succeed simultaneously. Under Section 9 these heirs take to the exclusion of all others. Section 10 provides for the distribution among the heirs in Class I of the Schedule in accordance with the following rules:

(156) *Daya Singh v. Dhan Kaur*, (1974) 2 S.C.J. 245; 1974 S.C. 663, Cf. *Mer Jesu Kachra v. Meram Jayaram Lakshman*, (1979) 20 Guj. L.R. 64

(157) 1959 Cal. 787.

(158) 1963 M.P. 360, *Kempiah v. Girigamma*, 1966 Mys. 189, *Gopi Chand v. Badamo Kuer*, 1966 Pat. 231; *Eramma v. Virupanna*, (1967) 1 S.C.J. 746 1966 S.C. 107.

(159) *Abanantudu v. Narayanamma*, (1972) 1 An. W.R. 306; 1972 A.P. 258

(160) *Parma Nagal v. Satya Deo*, I.L.R. (1972) 1 Delhi 682. 1973 Delhi 66

(161) *Bhagwandas v. Chhagabhai*, 1974 M.P.L.J. 455

(162) *Gurdit Singh v. Darshan Singh*, 1973 P. & H. 362 cf. *Arunachalghamal v. Ramchandran*, (1966) 1 M.I.J. 254; 1963 Mad. 255.

(163) *Commissioner of Wealth-tax v. Chander Sen*, (1974) 96 I.T.R. 694.

1. The intestate's widow, or if there are more widows than one, all the widows together shall take one share;

(2) The surviving sons and daughters and the mother of the intestate shall each take one share; and

(3) The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share

The distribution of the share among the heirs in the branch of each predeceased son or each predeceased daughter of the intestate, will be as follows: The distribution of the share among the heirs of the branch of the predeceased son shall be so made that the intestate's widow or widows together and the surviving sons and daughters get equal portions, and the branch of the predeceased son gets the same portion. Among the heirs of the branch of the predeceased daughter the distribution of the shares shall be so made that the surviving sons and daughters get equal portions.

Under Section 8 a son inheriting the property of his divided father takes it as his separate and individual property to the exclusion of his own son. This being the statutory provision no interest will accrue to the grandson in such property though this is derogatory of the law established according to the principles of Hindu Law. The statutory provision prevails.¹⁶⁴

Where a Hindu male dies intestate leaving behind a widow and a daughter both the widow and the daughter succeed to the property simultaneously under the Act to exclusion of all other heirs, and each of them takes her share absolutely under section 14. *Tripathi Dev v. Sharada Devi*.¹⁶⁵

But if the Hindu male died before the Act leaving a widow and a daughter and the widow had succeeded to his estate under the prior law the estate having vested in the widow prior to the Act she becomes the absolute owner of the estate by reason of section 14 of the Act and the daughter is not entitled to claim any interest along with the widow on the basis of co-heirship under this section. *Sampathkumari v. Lakshmi Ammal*.¹⁶⁶

A daughter with reference to section 8 and the Schedule means a legitimate daughter. With the father what the Act contemplates is legitimate relationship unlike with the mother. An illegitimate daughter is no heir of her putative father.¹⁶⁷

Remarriage of the mother does not affect her right to inherit the property of her son on his death as his heir.¹⁶⁸

3 Secondary heirs—Section 8 (b) provides that where there is no heir of Class I, then the property of a Hindu male dying intestate shall devolve upon the relative specified in

(164) *Additional CIT v. Karuppan Chettiar*, 1979 Mad. 1 (F.B.). See also *CIT v. Ram Rakeshpai*, (1968) 67 I.T.R. 164 (All). See however *C. I. T. v. Babubhai*, (1970) 108 I.T.R. 417, 420.

(165) 1968 All 773.

(166) 1 I.L.R. (1962) Mad. 882.

(167) *Appa v. Mutham*, 1975 Ker. L.T. 699, *Dadoo v. Raghunath*, 1978 Mah. L.J. 739.

(168) *Rajni Bai v. Mankumar*, 1978-M.P.L.J. 515.

Class II of the Schedule. Section 9 provides that in respect of these heirs in Class II those in the first entry shall be preferred to those in the second entry and those in the second entry shall be preferred to the heirs in the third entry and so on in succession and among these relatives the property shall be divided between the heirs specified in any one of the entries so that they share equally. There are 9 entries in Class II. Under the first entry comes the father, and he stands alone. In the second entry are found son's daughter's son, son's daughter's daughter, brother, and sister, and these share the property equally. Apropos this entry the Bombay High Court observes that the classification thereunder is not on the basis of nearness of blood relationship and the heirs in the first two categories are much far removed from the intestate than the heirs in the last two categories.¹⁶⁹ In the third entry are found 4 relatives, namely, daughter's son's son, daughter's son's daughter, daughter's daughter's son, daughter's daughter's daughter and these take equally. In entry four there are again 4 relations, namely, brother's son, sister's son, brother's daughter and sister's daughter. In Entry V father's father and father's mother alone come in. In entry VI father's widow and brother's widow come in and take equally. Entry VII mentions father's brother and father's sister taking equal shares. Entry VIII brings in mother's father and mother's mother and they take equal shares. The last and the 9th entry mentions mother's brother and mother's sister as taking equally. The brother or sister does not include a brother or sister by uterine blood. Father's widow in Entry VI must necessarily mean the step-mother since the mother comes under Class I, and since it is clear that a mother does not mean step-mother, mother's father and mother's mother cannot refer to step-mother's father or step-mother's mother in Entry VIII, and mother's brother and mother's sister in Entry IX cannot refer to step-mother's brother or step-mother's sister.

4. Agnatic relations.—Under section 8, if there is no heir coming under Class (I) or Class (II) of the Schedule to the Act, then the property of the deceased devolves upon his agnates. An agnate is defined in Section 3 (1) (a) as one related by blood or adoption wholly through males and Section 3 (1) (f) makes it clear that "related" means related by legitimate kinship. To come under the 3rd class of heirs, namely, agnates, the relative must not be one coming under the 1st or the 2nd class of heirs of the Schedule. For instance, the brother is an agnate, brother's son is an agnate, father's father, father's brother are also agnates, but since these come under Class II of the Schedule, they do not fall under the class of mere agnates who succeed only after the first two classes of heirs are exhausted. The order of succession among the agnates shall be determined in accordance with the rules of preference laid down under Section 12 as follows: Of two heirs, the one who has fewer or no degrees of ascent is preferred. Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent. Where neither heir is entitled to be preferred to the other under either of these tests, they take simultaneously.

5 Cognates—Under section 8 (d) cognates who do not come under Class (I) or Class (II) of the Schedule are brought in as heirs if there is no heir coming under either of those classes or under the class of agnates. Amongst the cognates also as in the case of agnates the order of succession should be determined in accordance with the rules of preference laid down for the agnates, namely: (1) of two heirs, the one who has fewer or no degrees of ascent is preferred; (2) where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent; and (3) where neither heir is entitled to be preferred to the other under these two rules, they take simultaneously.

(169) See *Parshottam v. Shripad*, 1976 Bom. 375.

9 Order of succession among heirs in the Schedule.—Among the heirs specified in the Schedule, those in Class (I) shall take simultaneously and to the exclusion of all other heirs, those in the first entry in Class (II) shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry, and so on in succession.

Scope—This section deals with the order of succession among the heirs in the Schedule to the Act. The Schedule mentions only two classes of heirs, heirs coming under class (I) and heirs coming under class (II). The difference between these two classes is that in the case of heirs of Class (I) they take simultaneously while the heirs mentioned in Class (II) do not all take together, the distribution of the heirs coming under Class (II) being governed by Section 11 as already mentioned. This section lays down that the heirs mentioned in Class (I) exclude the heirs mentioned in Class (II) and all other relations and that with reference to Class (II) heirs, the heirs mentioned in a previous entry will exclude the heirs mentioned in a subsequent entry. Thus father will exclude son's daughter's son because the father comes under the first entry of Class (II) and son's daughter's son comes in the second entry. So also son's daughter's son who comes in the second entry of Class (II) excludes the daughter's son's son who comes in the third entry of Class (II). A reference to these entries will show which of these second class heirs will exclude the others coming in the said class. It is manifest that the intention of the Legislature is to scheme out a line of succession based upon nearness of relationship said presumed natural affection of the deceased and that there should be no distinction between persons standing in the same degree of relationship merely by reason of sex or by any principle of superiority of one born through a male over another through a female. The word 'entry' in this section as well as in Section 11 can refer only to all going under a Roman numeral and not one that is denoted by the Arabic one. Hence the groups of heirs specified in the various entries under class (2) will simultaneously succeed excluding those in the succeeding entries. *Arunachalam v. Ramchandram Pillai*¹⁷⁰

10 Distribution of property among heirs in class I of the Schedule.—The property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules:—

Rule 1—The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2—The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3—The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.

Rule 4—The distribution of the share referred to in Rule 3—

(i) among the heirs in the branch of the predeceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his pre-deceased son gets the same portion;

(ii) among the heirs in the branch of the predeceased daughter shall be so made that surviving sons and daughters get equal portions.

Scope—The section deals with the distribution of the properties amongst heirs under Class (I) of the Schedule. The property of an intestate shall be divided amongst such heirs in accordance with the following rules: 1. An intestate's widow shall take one share, but if there are more widows than one all of them together shall take one share. 2. Each of the sons will take a share. 3. Each of the daughters will take a share. 4. The mother will take a share. 5. If a son has predeceased leaving heirs, the widow, the son and daughter of such predeceased son shall take as between them one share. 6. If a daughter has predeceased leaving her heirs, her sons and daughters shall take as between them one share. 7. The distribution of the share in the branch of each predeceased son shall be so made that his widow or all his widows together and the surviving sons and daughters get equal portions, and the branch of the predeceased son's predeceased son gets the same portion. 8. In the case of the branch of a predeceased daughter the distribution shall be so made that the surviving sons and daughters of the predeceased daughter get equal portion.

Where a male dies leaving two widows and sons and daughters, both the widows take one share as tenants-in-common and each of the sons and daughters takes one share and, on the death of a widow the share taken by her as a co-owner along with her co-widow does not go to the co-widow but to her own heirs (*Mani v Ramakrishna*)¹⁷¹.

11. Distribution of property among heirs in Class II of the Schedule—The property of an intestate shall be divided between the heirs specified in any one entry in Class II of the Schedule so that they share equally.

Scope.—This section deals with the distribution of the properties amongst heirs under Class (II) of the Schedule. It must be remembered that none of these heirs can come in so long as an heir mentioned in Class (I) is available. It must also be remembered that an heir coming in a prior entry in Class (II) is preferred to an heir coming in a subsequent entry in Class (II). But when in the same entry more heirs than one are mentioned, they share equally. Thus in Entry (II) four heirs are mentioned, namely, son's daughter's son, son's daughter's daughter, brother and sister, and all these 4 relations being in the same entry take together each taking an equal share. So also in Entry (III) and Entry (IV), a group of 4 relations is mentioned, and all these relations in each group take together. But in each of the Entries (V), (VI), (VII), (VIII) and (IX) one finds only two relations and these two relations shall take equally.

The use of Arabic numerals in Entries II to IV of Class II only have no particular significance. Numbers or numerals are employed for the sake of convenient and easy reference, but their use cannot override the statutory provisions. The use of Arabic numerals is not decisive of the point whether or not the heirs in Entry II of Class II succeed simultaneously and equally. The language in section 11 that the property of an intestate shall be divided between the heirs in any one Entry in Class II so that they share equally would not be consistent with the view that the heirs shown against an Arabic numeral constitute an Entry within the meaning of Section 11. It is also significant that in Class I males and female heirs are treated as equal and there is no reason why it should be different in Class II. In the absence of any indication in the sections or the Schedule itself to make a radical departure from the general scheme of classification of heirs, it cannot be said that in the case of Entries II to

(171) (1970) Mah. L.J. Note 23 Bombay.

IV only the Legislature intended to create an order of preference and lay down the same by Arabic numerals. Thus the brother and sister of her husband will succeed to her taking equal shares.¹⁷³ The word "Entry" in Section 11 denotes the group of persons represented by the Roman numerals in Class II to the Schedule and not by the Arabic numerals. A brother's daughter will not exclude a sister's son.¹⁷⁴ The expression "they share equally" in Section 11 refers to the individual shares within the particular entry and not to any particular group of heirs as constituting one unit.¹⁷⁵

12 Order of succession among agnates and cognates—The order of succession among agnates or cognates; as the case may be, shall be determined in accordance with the rules of preference laid down hereunder:—

Rule 1—Of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2—Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3—Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

SECTION 12—SYNOPSIS

- | | |
|----------------------|---------------------------|
| 1. Scope | 3. Degrees of descent. |
| 2. Degrees of ascent | 4. Taking simultaneously. |

1. **Scope.**—This section deals with the order of succession among agnates and cognates who do not come under Class (I) or Class (II) of the Schedule to the Act. The agnates are preferred to the cognates as already mentioned in section 8 (c) and 8 (d). The order of succession among agnates or cognates as the case may be, shall be determined in accordance with the following rules of preference:—

(1) Of two heirs one who has fewer or no degrees of ascent is preferred. 2. Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent. 3. Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2, they take simultaneously.

2. **Degrees of ascent.**—Rule (1) of section 12 which says that of two heirs the one who has fewer or no degrees of ascent is preferred means that an heir who claims as the descendant of the propositus or one who is in the nearer line to him is to be preferred to one who claims in a remoter line. Thus, leaving out the heirs mentioned in Classes (I) and (II) of the Schedule, a son's son's son's son, being a descendant in the line of the deceased is to be preferred to brother's son's son who comes in the father's line which is remoter than one's own line. Again, a brother's son's son being in the father's line is to be preferred to father's brother's son's son who is in a remoter line, namely, the line of the grandfather. Each line must start either with the propositus when the claimant is a descendant of the propositus or

(172) *Saya Charan v. Urmila*, 1970 S.C. 1714.

(173) *Rangaswamy v. Raghayya*, (1972) 1 M.L.J. 25 85 L.W. 724.

(174) *Thandani v. Kuppammal*, (1973) 1 M.L.J. 25: 86 L.W. 793; 1973 Mad. 274; *Kumara Pillai v. Kunjalekshmi Amma*, 1971 Ker. L.T. 937; 1972 Ker. 66.

with the father or any other male ancestor of the propositus. This rule lays down merely that a relation who traces his relationship to the propositus either in the propositus' own line or in the line of a nearer ancestor is to be preferred to one who traces his relationship in the line of a remoter ancestor in the male line. This will be the position with reference to agnates. Similar principles will apply to relations claiming as cognates. It must be remembered that there is no distinction shown here between a male claimant and a female claimant. Hence a father's father's brother will take equally with father's father's sister. So also mother's father's brother, will take equally with mother's father's sister.

3. Degrees of descent.—Rule (2) of section 12 says that in the case of agnates or cognates, where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent. This means the same thing as that where a person in the same line is nearer to the common ancestor than another relation of the same line, the former is preferred to the latter. Thus a father's brother's son being nearer than father's brother's grandson is preferred to the latter though both of them are in the same line, namely, the line starting from father's father. So also the brother's son's son, is to be preferred to the brother's son's son's son for though both the claimants are in the same collateral line beginning from the father, brother's son's son is nearer or has fewer degrees of descent than the brother's son's son's son. In the same way a son's son's son's son is to be preferred to a son's son's son's son's son for though the claimants are in the same line, namely, the line of the propositus the former is in a nearer degree than the latter. Where both the claimants are cognates and their degree of ascent is the same, under rule 2 of section 12, the claimant who is one degree remoter in descent will be excluded by the other ¹⁷⁵.

4. Taking simultaneously—Where the heirs are equal in descent in the same line they take simultaneously. Father's father's father and father's mother's mother take equally being in the same line, so also son's son's son's daughter and son's son's son's son take equally both being in the lines of the deceased and neither being nearer in descent. In the application of these rules there is no discrimination on the ground of sex. It should not be forgotten that a relation who is an agnate though in a remote degree of ascent or descent or of both is to be preferred to a cognate who may be in a nearer degree or nearer line or both.

13. Computation of degrees.—(1) For the purposes of determining the order of succession among agnates or cognates, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

Scope.—This lays down the rules for the computation of degrees. For the purpose of determining the order of succession among agnates or cognates, the relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both as the case may be. Degrees of ascent and degrees of descent shall be computed inclusive of the intestate. Every generation constitutes a degree either ascending or descending.

14. Property of a female Hindu to be her absolute property—(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.—In this sub-section "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree or order or award prescribe a restricted estate in such property.

SECTION 14—SYNOPSIS

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1. *Scope*—The Hindu Succession Act confers upon females full rights of inheritance and sweeps away the traditional limitations on her powers of disposition which were regarded under the Hindu law as inherent in her estate¹⁷⁶. Before the enactment of section 14 the properties in the possession of women were either absolute properties with which they could deal in any manner they liked or properties in which they held what was called a limited estate, a peculiar kind of property almost unknown in any other jurisprudence. The nature and the quality of this limited estate is discussed in sections 509 and 511. Under section 14 subject to certain exceptions where a limited estate has been created by a written instrument, etc., whatever property is in the possession of a woman, whether it has been

(176) *Minors v. Rajguru*, 1962 S.C. 1493.

acquired before or after the commencement of this Act shall be regarded as her absolute property. The word "acquired" in section 14 (1) has to be given the widest possible meaning because of the language of the *Explanation* to section 14 (1).¹⁷⁷ It implies that the woman got or there came or fell to her some right, title or interest in the property by virtue of which she could hold the property and claim it to be in her exclusive possession and no one else could compete with her or defeat or frustrate whatever she acquired.¹⁷⁸ Sub-section (1) provides that any property possessed by a Hindu female shall be held by her as full owner thereof and not as a limited owner. The words "any property" are, even without any amplification, large enough to cover any and every kind of property, but in order to expand the reach and ambit of the section and make it all comprehensive an *Explanation* has been enacted to the 1st sub-section which provides that the expression "property" includes both movable and immovable property, acquired by a female Hindu by inheritance or devise or at a partition or in lieu of maintenance or arrears of maintenance or by a gift by any person, whether a relative or not before, at or after marriage or by her own skill or exertion or by purchase or by prescription, or in any other manner whatsoever and also any such property held by her as *stridhans* immediately before the commencement of this Act. Whatever be the kind of property, movable or immovable and whichever be the mode of acquisition, it would be covered by sub-section (1) of Section 14, the object of the Legislature being to wipe out the disabilities from which a Hindu female suffered in regard to ownership of property under the old Shastric law, to abridge the stringent provisions against proprietary rights which were often regarded as evidence of her perpetual tutelage and to recognise her status as an independent and absolute owner of property.¹⁷⁹ The *Explanation* seeks to indicate what the word "property" in sub-section (1) means. The emphasis, however is not so much on the word property as on the several modes by which the same was open to acquisition. Hindu woman is sought to be made the absolute owner of the property acquired by her by any one of the several modes detailed in the *Explanation* to Section 14 (1) on the statutory assumption that the woman is the limited owner of the property acquired by her in any of these modes though in point of fact such acquisition may not amount to ownership in any sense, or even an interest therein but amounts only to some interest or right to the property. A Hindu woman is assumed to have acquired limited ownership under this statutory fiction even in properties allotted to her in discharge of her mere right of residence or in lieu of her right to maintenance though in fact such acquisition happens to be only of some right or interest, not in but to, the same and she is expressly then declared to have become absolute owner thereof on this footing.¹⁸⁰ The second sub-section provides that nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award, prescribe a restricted estate in such property. The scope and area of sub-section (2) is quite separate and defined, it applies only to such transactions as confer a *new right, title or interest* on the Hindu female.¹⁸¹ Sub-section (2) is more in the nature of a proviso or exception to sub-section (1) and being in the nature of an exception to

(177) *Badri Prasad v. Smt. Kanso Devi*, 1970 S.C. 1963.

(178) *Raj Kumar v. Sardarm Prem Prakash Kaur*, 1972 P. & H. 473

(179) *Tulasamma v. Seetha Reddy*, (1976) 1 S.C.J. 29; 1977 S.C. 1944 1947

(180) *Ramchandra v. Saptarishi*, 1978 Bom. 212 cf., *Ram Prakash v. Prakash Narain*, (1976) 4 A.L.R. 715.

(181) *Tulasamma v. Seetha Reddy*, *supra*.

a provision which is calculated to achieve a social purpose by bringing about a change in the social and economic position of women in Hindu society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1). It cannot be interpreted in a manner which would rob sub-section (1) of its efficacy or emasculate it.¹⁸³ Sub-section (2) must be read in the context of sub-section (1) and must be confined to cases where property is acquired by a female Hindu *for the first time as a grant without any pre-existing right*, under a gift, will, instrument, decree, order or award the terms of which prescribe a restricted interest in the property.¹⁸⁴ It is not enough for the decree, order etc., to prescribe the restricted estate. It is further necessary that the female Hindu should acquire the property under that very decree or order.¹⁸⁵

In *Sumathra v. Maharaj*¹⁸⁶ a female Hindu who had inherited her husband's property made a gift of a portion thereof to her illegitimate daughters prior to the coming into force of the Act. It was held that the next presumptive reversioner had a right to challenge the aforesaid gift and get a declaration that it would be void and ineffective as against their interests and that the illegitimate daughters could not claim that their right to remain in possession during the lifetime of the donor had matured into absolute rights by virtue of this section.

This section has application only where the female in possession of the property is a Hindu. A Christian woman belonging to a community in a particular locality though governed by Mitakshara law will not be within the purview of the section.¹⁸⁷

2. Any property possessed by a female—The expression 'possessed' gives the indication of the cases to which the section is made applicable. Unless the property is in possession of a female Hindu, whatever be the manner of its acquisition or the time of such acquisition, this section has no application. The female Hindu must be alive and must be in possession of the property in question. If the woman had died before the Act, or if she had ceased to be in possession even prior to the Act, this section can have no application. If the woman had sold away the property prior to the Act and the property had ceased to be in her possession even prior to the Act by reason of such sale, such property cannot attract the application of this section. See *Kotturuswami v. Vetravan*¹⁸⁷ *Babu Rao v. Nareji*¹⁸⁸ *Mst. Janku v. Kisan*,¹⁸⁹ *Madadkhal v. Arumugha*.¹⁹⁰ See also *Andalammal v. Sivaprasada*,¹⁹¹ [a female in possession without any rights].

(182) *Tulasamma v. Sathya Reddy*, (1978) 1 S.C.J. 29 A.I.R. 1977 S.C. 1944, 1947, 1948, 1968

(183) *Ibid*, 1948, 1972 See also *Badri Perishad v. Smt. Kausa Devi*, 1970 S.C. 1963; *Chellammal v. Nallammal* (1971) 1 M.L.J. 439; *Vengayal v. Theyyanayaki*, (1979) 1 M.L.J. 87.

(184) *Bhagwan v. Vishwanath*, 1979 Bom. 1, cf., *Ganeshwar v. Haren*, 1974 Gau. 73 [Declaration of ownership in virtue of heirship to husband and not in virtue of decree, S. 14 (1) alone applies].

(185) 1963 H.P. 21.

(186) *Arunkammal v. Taluk Land Board*, 1977 Ker. LT 393

(187) 1959 S.G.J. 437 (1959) 1 M.L.J. (S.C.) 158.

(188) 1961 Bom. 300.

(189) (1959) M.P. 1.

(190) (1958) 1 M.L.J. 101; (1958) Mad. 255.

(191) I.L.R. (1963) Mad. 960.

The use of the expression "possessed by" instead of the expression "in possession of" in Section 14 (1) was intended to enlarge the meaning of that expression. A property is said to be possessed by a person if he is its owner even though he may, for the time being, be out of actual possession or even constructive possession.¹⁹² The term has been used in a very wide sense so as to include the state of owning or having the property in one's power. For applying Section 14 (1) it is sufficient if a Hindu woman has a right in the property and the said property is in her power or domain.¹⁹³ It is enough if the woman has a right to the property of which she is in possession however restricted the nature of her interest may be.¹⁹⁴ Unless the possession of the female owner, rested on some vestige of title in her it will not enable her to take advantage of Section 14.¹⁹⁵ Where the Hindu female has parted with her rights so as to place herself in a position where she could in no manner exercise her right of ownership any longer; section 14 (1) cannot apply.¹⁹⁶ Nor can mere physical possession of the property without the right of ownership attract the provisions of sub-section.¹⁹⁷ nor possession as a trespasser.¹⁹⁸ In *Jivanandam v. Sita Ram*¹⁹⁹ it was held that the karta of a joint family was entitled to alienate the family property for the legal necessity of the family so as to be binding upon his mother who had succeeded to her husband's interests in the family property. The reason given that without partition, the widowed mother could not be taken to be possessed of the property without which the absolute ownership as provided in Section 14 would not come to her benefit is not, however, sound. The expression "any property possessed by a female Hindu" would include the proprietary right which had accrued to a Hindu widow under the Hindu Women's Rights to Property Act of 1937 even though the latter Act now stands repealed by the Hindu Succession Act. *Govandammal, v. Ramaswami*.²⁰⁰

3. Possession.—For property to be "possessed" by a female Hindu as provided in Section 14 (1) two things are necessary. (1) she must have had a right to the possession of the property; (2) she must have been in possession actually or constructively.²⁰¹ The term "possessed" should be understood in the legal sense of entitlement to secure such possession. It may be in any manner recognised by law.²⁰² A Hindu widow remaining in possession of her first husband's property without title after her remarriage before the Hindu Succession Act came into force

(192) *Mangal Singh v. Smt. Ratno*, 1967 S.C. 1786.

(193) *Mumtaz v. Rajkumar*, 1962 S.C. 1493.

(194) *Asharam v. Sanyasi*, 1976 Bom. 272.

(195) *Manakrishnamurthy v. Srinivasaga Reddiar*, (1971) 1 M.L.J. 64, 84 L.W. 626 [widow after executing sale deed before the Act continuing in possession—possession not being rightful benefit of S. 14 (1) is not available].

(196) *Mangal Singh v. Smt. Ratno*, supra.

(197) *Branna v. Perrepanna*, 1966 S.C. 1879, *Rangammal v. Maryammamma Muthuraja*, (1970) 2 M.L.J. 620.

(198) *Dindyal v. Rajaram*, 1970 S.C. 1019.

(199) 1961 Pat. 347.

(200) 81 L.W. 655.

(201) *Dindyal v. Rajaram*, supra.

(202) *Badi Prasad v. Smt. Kango Devi*, 1970 S.C. 1963, *Nanak Singh v. Smt. Chhishu*, 1974 Pat. 220; *Narasimhaiah v. Andalammal*, (1978) 2 M.L.J. 520; 1979 Mad. 31.

does not acquire absolute title to the property.²⁰³ The expression 'possession' in this Section may be said to indicate the concept underlying that expression in Section 110 of the Evidence Act. That section runs as follows: "When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." To constitute possession it is not necessary that there should be physical contact. Mere possibility of a person dealing with a property exclusively as he likes may constitute possession: *R v Lallu*.²⁰⁴ Possession does not mean always actual user. *Rakhal v Durga*.²⁰⁵ Possession being a legal expression provable in many ways a man can be in possession by himself cultivating or through his tenants and possession by receipt of rents is also possession known to and respected by law (*Chera Kunhi v Mulakaimal*).²⁰⁶ Even occasional visits and use of a house can be held evidence of possession unless it is shown that coming to the house is in the capacity of a visitor. *Unniketram v. Brojo*.²⁰⁷ The acts which are indicative of possession must necessarily vary with the nature of the property. *Wali Ahmad v. Tata*.²⁰⁸ Possession in fact is manifested by the exercise of such exclusive control as the object is capable of. In the case of wild uncleared land payment of taxes may be sufficient evidence of possession. *Kirby v Cowdery*.²⁰⁹ In Sircar's Evidence at page 110 occurs the following passage with reference to possession or control over a portion of property:

"For the purpose of going into possession of land, it is not necessary to walk over the whole of it, but it is enough where the lands are connected geographically to go on to one piece of the land in the name of the whole (*Hanmanta v Mir Aymoodin*).²¹⁰ Evidence of possession of certain specific property is treated as evidence of possession as regards appendage of such property, though no definite acts of possession were proved as regards the appendage. So the possession of a garden imports the possession of the garden wall (*Iqbal v Nand Kishore*).²¹¹ To prove ownership of an unenclosed piece of land, acts of ownership in one part may be presumed to be acts of ownership over the whole, unless there are circumstances rebutting that presumption. Evidence may be given of acts done in other parts, provided that there is a common character of locality as would raise an inference that the place in dispute belonged to the plaintiff if the other part did (*Vithaldas v Secretary of State*).²¹² Exercise of acts of ownership over various portions of a forest land is evidence of possession of the whole tract (*Siva Subramanya v Secretary of State*).²¹³ If a person without title acquires possession of part of land and proceeds to mark out the area on the entire land which he intends to possess, he will be presumed to be in possession of the entire area though he has

(203) *Sankar Prasad v. Usha Bala*, 1973 Cal 25 82 Cal. W.N. 880

(204) 43 Bom 550

2. 5) 26 CWN 724

(2. 6) 37 M L J 544

(207) 11 WR 136

(208) 31 Cal. 397

(209) 1912 A.C. 599

(210) 6 Bom LR 1104

(211) 24 A 294

(212) 26 B. 410, 416, 4 Bom. L.R. 23

(213) 9 M. 285

physical control over only a portion (*Tikait v. Namah*),²¹⁴ see also *Vithaldas v. Secretary of State*.²¹⁵ *Ramjan v. Fakir*²¹⁶, with regard to land lying within defined boundaries, it is to be assumed that the acts of possession upon one part of the land shows possession of the person in respect of the whole land (*Clark Elphinstone*).²¹⁷ Acts of control of enjoyment in one part of land are relevant to show possession of the whole (*Jones v. Williams*).²¹⁸ But in questions of disputed ownership of land, occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area, unless it can be reasonably attributed to a right to the whole area. The portions so occupied may be so numerous that they practically cover the whole area, or the occupation of a portion may be reasonably attributed to a right of ownership in a larger area. But that larger area must be defined, in other words it must be attributable to an existing boundary (*Omanene v. Chis Obeng*).²¹⁹

"As a general rule possession of part is in law possession of the whole, if the whole is otherwise vacant. But constructive possession of this kind can only be presumed when there is a claim based upon title (*Maheshwar v. Pratap*).²²⁰ But possession or part occupation by a wrong-doer of a portion of the land cannot be held to be constructive possession of the whole so as to enable him to obtain thereby a title by limitation, *Wali Ahmad v. Tola*.²²¹ *Moham v. Promotha*.²²² see also *Secretary of State v. Krishnamoni*.²²³ Possession of part is constructive possession of the whole which is an incident of ownership resulting from title. This doctrine does not apply where the occupant depends on the ground of possession only without proving title (*Pramatha v. Maik*).²²⁴ Possession by a trespasser is confined to the land actually occupied by him (*Maheshwar v. Pratap*).²²⁵ Where a tenant is in possession of land adjacent to other lands, admittedly under his cultivation, and pays rent for the whole area it is presumed to be a part of his holding (*Kashinath v. Durga*)."²²⁶

A lucid discussion of what constitutes 'possession' is to be found in Note 11 under Articles 142 and 144 of the Limitation Act of 1908 by Chitaley as follows

"A possession in fact must be distinguished from a possession in law. A possession may exist in fact but not in law. Thus the possession by a servant of his master's property is for

(214) 80 I.C. 544

(215) 26 B. 410, 417

(216) 82 I.C. 461 (S.)

(217) L.R. 6 A.C. 164 H.L.

(218) (1837, 3 M. & W. 326

(219) 151 I.C. 940; A.I.R. 1934 P.C. 185

(220) 2 I.C. 63 12 O.C. 58

(221) 31 Cal. 397.

(222) 24 C. 256

(223) 29 C. 518 P.C. 6 G.W.N. 217

(224) 56 I.G. 184 5 P.L.J. 373.

(225) 2 I.C. 63.

(226) 1 P.L.J. 604

some purposes not recognised as such by law, but is merely regarded as a detention or custody rather than possession (Salmond's Jurisprudence 8th ed., page 294). Again, a possession may exist in law but not in fact. Thus, the owner of a submerged land would in law be deemed to be in possession of the land notwithstanding that, actually, he could not have been in possession of it. Similarly, the owner of a land, who has parted with the surface rights therein, is deemed to be in possession of the subsoil, though as a matter of fact he is not in actual possession of it. The possession thus attributed to him by law is known as constructive possession. Such constructive possession is really nothing more than the right to take physical possession, and does not depend upon user.

"A possession in fact may be either in respect of a corporeal property, or in respect of an incorporeal right such as a right to an office, a dignity or a monopoly. But in either case two elements must exist in order to constitute a possession in fact—the *animus possidendi* and the *corpus possessionis*. The former is the mental element and consists in the intent to possess. The latter is the physical element and consists in the concrete realisation of the intent by actual user of the thing sought to be possessed.

"What constitutes *corpus possessionis* in the case of corporeal property differs, however, to some extent from what may be necessary to constitute *corpus possessionis* in the case of incorporeal property. In the case of corporeal property it consists, according to Sir John Salmond, in the continuing exclusion of alien interference coupled with the ability to use the thing oneself at will. Actual use of it is not essential. In the case of incorporeal property it consists in actual continuous use and enjoyment, that being the only possible mode of exercise in such cases.

"It follows from the above discussion that acts of user without the *animus possidendi* or the intent to possess do not constitute possession at all and therefore, do not constitute adverse possession. Thus, mere acts of trespass without any intent to possess do not constitute adverse possession. The tying and grazing of cattle by a person without title on vacant or waste land, do not, in this country, excite any particular attention and are neither meant to denote nor understood as denoting an intent to possess, and consequently do not constitute possession. In the case of uncultivated and jungle land which produces nothing but self-sown trees and a seasonal crop of wild grass, it has been held by their Lordships of the Privy Council that sporadic invasions by the person without title and the grazing and carrying away of grass and the cutting of firewood do not amount to such possession as will enable him to prescribe for a good title. Again, the mere existence of the *animus possidendi* will not be sufficient without actual user. Thus, the mere entry of a piece of land in the Revenue Records as Government waste does not transfer possession to Government. As regards the *corpus possessionis*, the nature of the requisite possession must vary with the nature of the subject possessed. The possession must be a kind of possession of which the particular subject is susceptible. A forest land on hills, very little of it being capable of cultivation, 'is far removed as a subject of definite possession from lands under continuous and permanent cultivation compactly situated and capable of being remembered with identification as the lands held and occupied in articulate plots or under leases'. The Crown, in the case of a fishery belonging to it, exercises its rights by granting leases or licenses to fish, it does not itself fish. Consequently the granting, by a person other than the Crown, of leases or licenses to fish in the case of a fishery which *prima facie* belongs to the Crown is evidence of usurpation by that person of the distinctive rights of the Crown and is thus most significant evidence of adverse possession.

"Where a person entitled to possession enters in the assertion of that possession, law vests the actual possession in him. If there are two persons in a field each asserting that the land is his, and each doing some act in the assertion of the right of possession and if the question is which of these two is in actual possession, it must be held that the person who has the title is in actual possession and the other person is a trespasser."

The word "possessed" is used in a broad sense and includes possession of the property not in her actual possession but to which she may have a right in law to recover possession of as in the case of a trespasser who has not perfected his title by adverse possession. The possession of the mortgagee or of the lessee or licensee would all fall within the ambit of the expression "possessed". In the broader sense, the term "possession" is ownership: *Rameswar v. Sheopujan*,²²⁷ *Krishna Das v. Akhil Saha*,²²⁸ see *Kotturawami v. Veerappa*.²²⁹

Even if a female Hindu be in fact out of actual possession the property must be held to be possessed by her if ownership right in that property still exists and in exercise of the ownership rights she is capable of obtaining actual possession of it.²³⁰ The relevant date on which the female Hindu should be possessed of the property must be the date on which the question of applying the provisions of Section 14 arises. The expression "possession" does not apply to a case without title. (*Mahal Singh v. Rathno*²³¹ *Eramma v. Veerupanna*²³²).

As to whether a property possessed by a Hindu female but sold by her prior to the Act can be said to fall under section 14 (1) it has been held that section 14 (1) would not apply to such a case and the reversioner could recover that property (*Mt. Janku v. Kishor*,²³³ *Rajalopathy Semiah v. Rattama*,²³⁴ *Harak Singh v. Kailash Singh*²³⁵.) The Act is certainly not intended to benefit alienees or to unduly enrich the alienees who with their eyes open purchased properties from the limited owners without justifying necessity before the Act came into force and at a time when the vendors had only the limited interest of a Hindu woman: *Arumuga Gounder v. Natchimuthu Pillai*²³⁶ *Mt. Lukas v. Nirangam*,²³⁷ *Chanderasekara Iyer v. Sivarama Krishna Iyer*²³⁸ *Hanuman Prasad v. Indrapathi*,²³⁹ *Sansir v. Satyabathi*²⁴⁰, *Marudakkal v.*

(227) 1959 Pat. 75.

(228) 1958 Cal. 671.

(229) 1959 S.C.J. 437 (1959) 1 M.L.J. (S.C.) 158.

(230) *Rabari v. Bat Mans*, (1976) 17 Guj. L.R. 723 [property in the wrongful possession of a trespasser is deemed to be possessed by a female Hindu within the meaning of S. 14 (1)].

(231) 1967 S.C. 1786.

(232) 1966 S.C. 1879. See further *Mahgal Singh v. Smt. Rattno*, supra, *Dundyal v. Rajaram*, 1970s S.C. 1019.

(233) 1959 M.P. 1.

(234) (1958) 2 An.W.R. 662.

(235) 1958 Pat. 561 (F.B.).

(236) (1958) 2 M.L.J. 154.

(237) 1958 M.P. 160 (F.B.).

(238) 1958 Ker. 142.

(239) 1958 All. 304.

(240) 1958 Ori. 75.

Aruna Gounder,²⁴¹ *Ramchandra v Sakaram*²⁴², *Peđa Pedda Yellaiiah v Gangamma*,²⁴³ *Golla Bihari v. Hari Das*,²⁴⁴ *Thailambal Aammal v Kesavan Nair*,²⁴⁵ *Harikishan v Hira*²⁴⁶ A contrary view, found in some cases *Vairjnath v Ramawatar*²⁴⁷, *Ramsaroof v Hiralal*,²⁴⁸ *Hanuman Prasad v Indrapathi*²⁴⁹ cannot be sustained either on the literal construction of section 14 (1) or by having reference to the object of the enactment *Sri Kotturuswami v Veerappa*.²⁵⁰

Where a widow inheriting her husband's property sold it before the Hindu Succession Act came into force and such sale was on a suit brought by the reversioners held not binding on them and the widow repurchased the property after the Act came into force and again sold it, the sale cannot be challenged inasmuch as, notwithstanding the prior decree, the widow become the absolute owner on her acquiring the property by re-purchase and could therefore convey her full title under the subsequent sale.²⁵¹

The mere fact that a female is in possession of another's property as a trespasser without any right thereto does not attract the provisions of Section 14 (1) so as to confer on her an absolute interest therein *Dindyal v Rajaram*²⁵² *Andalammal v Sivaprasada*.²⁵³

In order to confer an absolute estate on the female both possession, actual or constructive, and acquisition of the property must co exist when or after the Act came into force though they might not have come into existence simultaneously *Anandibai v Sundarabai*²⁵⁴ *Dindyal v. Rajaram*.²⁵⁵ Before any woman can be said to be possessed of property within the meaning of Section 14 for the purpose of acquiring absolute title to the property she must have not only possession of the property but also a right to the possession of the property. Whether the acquisition is at the commencement of the Act or the property was subsequently acquired and possessed, she becomes full owner notwithstanding that the compromise under which she got it prescribed a limited estate therein.²⁵⁶

(241) 71 L.W. 57 (1958) 1 M.L.J. 101.

(242) 1957 Nag. L.J. 161.

(243) (1957) 1 An. W.R. 258.

(244) 1957 Cal. 557.

(245) 1957 Ker. 86.

(246) 1957 Punj. 89.

(247) 1958 Pat. 227.

(248) 1958 Pat. 319.

(249) 1958 All. 804.

(250) 1959 S.C.J. 437 (1959) 1 M.I.J. (S.C.) 158 1959 S.C. 57.

(251) *Bhagwan v Vishwanath*, 1979 Bom. 1.

(252) 1970 S.C. 1019.

(253) 1 L.R. (1963) Mad. 360; 1963 Mad. 452.

(254) 1969 M.F.L.J. (Notes) 83.

(255) 1970 S.C. 1019.

(256) *Rasi Bai v. Gagan Singh*, 1978 Rev. L.R. 597.

4 Property—In *Jones v. Skinner*,²⁵⁷ 'property' has been defined by Lord Langdale as the most comprehensive of all the terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have. This comprehensive sense will include all rights relating to physical objects such as a charge *Fida Ali v. Inayat*,²⁵⁸ *Mohan Singh v. Sopa Ram*,²⁵⁹ the equity of redemption *Mulhuviyaya v. Vankatachalam*,²⁶⁰ *Ramshankarlal v. Ganesh Prasad*,²⁶¹ a vested remainder *Ghulam Hussain v. Fakirmohammed*,²⁶² *Unesh Chander v. Zakir Fatima*²⁶³ and the interest of a person in possession though without title *Ganesh v. Dasso*²⁶⁴, *Shri Gopal v. Ayesha Begam*,²⁶⁵ *Pahlwan Singh v. Ram Barose*²⁶⁶. In *Ma Yait v. Official Assignee*,²⁶⁷ the Privy Council held that even a contingent interest will come under the definition of property provided it is not a mere possibility. Copyright (*Machmillan & Co. v. Dent*²⁶⁸) and all legal rights of a person except his personal right which constitute his status or personal condition will come under the scope of property, (Salmond on Jurisprudence, 8th edn., page 443). But the right to the property must be a right in existence, and a person not having any right *in praesenti* cannot be said to have any property. (In re. *The Streatham and General Estates Company*)²⁶⁹. It will also include an actionable claim and everything that is property for the purpose of the Transfer of Property Act. In *Dworkadas Srinivas v. Sholapur Spinning and Weaving Co.*,²⁷⁰ it was held that the expression "property" must be construed in the widest sense as connoting a bundle of rights exercisable by the owner in respect thereof and embracing within its purview both corporeal rights and in corporeal rights. In the absence of a restrictive definition in the relevant statute it is not proper to restrict its scope and comprehensiveness. This definition may be adopted in the interpretation of the word 'property' as used in this section and in finding out to which cases of property in possession of the limited female holder the section is intended to apply. In this view the right of a widow as a trustee of a religious or charitable endowment which, according to the concept of Hindu jurisprudence is immovable property, may also fall within the ambit of this section, subject of course, to the condition that if the office of the trustee necessarily involves the performance of spiritual duties which a woman cannot discharge, such duties should be arranged to be done by a suitable male deputy. (See *Karthian Kone v. Bagayathammal* ²⁷¹).

(257) 1835 42 RR 274 5 L J Ch 87

(258) 5 IC 701

(259) 1924 Oudh 209.

(260) 20 Mad 35

(261) 29 All 385

(262) 1947 Bom 185

(263) 18 Cal 164 (P C)

(264) 1927 All 659

(265) 29 All 52

(266) 27 All, 169.

(267) 1930 PC 17.

(268) (1907) 1 Ch. 107.

(269) (1897) 1 Ch. 15

(270) 1954 S.C. 119

(271) 82 L.W. 423.

The property in this section will include the compensation money representing the value of the property which has been compulsorily acquired under the Land Acquisition Act. *Saila Bala Dan v. Saila Bala Dan* ²⁷² The right to a share of a woman on partition is itself 'property'.²⁷³

5 A female Hindu.— This section has application only where the female who is in possession of the property falling within the ambit of this section is a Hindu. If a Hindu woman who had inherited from her husband on his death prior to this Act had become converted to some other religion but continued to hold the property, the limited estate which she held cannot be converted into a full estate by the operation of this Act, because at the time the Act came into force she was not a Hindu. So also if the possession by the female Hindu commenced in her capacity as the widow of the last male-holder who died prior to the Act, but she had forfeited that state by reason of her re-marriage before the Hindu Succession Act came into force, it cannot be said that she was possessed of the estate of her first husband so as to enlarge the estate into an absolute one. If she had already been divested of her interest as a widow on account of her re-marriage before the commencement of this Act, her possession of the property cannot be said to be in her right as a Hindu widow and the reversioners would become entitled to the property immediately on her re-marriage and the position is not affected or altered by the fact that the reversioners neglected to take action to dispossess her. *Dwarik v. Sukari* ²⁷⁴ The female Hindu may be a widow, or a maiden or a married woman, and the property acquired by her may be movable or immovable and may have been acquired either before or after the Act and by any of the ways mentioned in *Explanation*. For the application of this section three things are posited 1. There must be property. 2. There must be a Hindu woman and 3. That property must be possessed by her at the time the Act came into force. If these three things co-exist, then, she shall hold the property from the date of this Act as full owner in whatever way she might have acquired it, and whatever be her rights in the property, except in cases excepted under sub-section(2)

5-A As full owner—The full ownership conferred on a Hindu female under Section 14 (1) is an absolute one and is not defeasible under any circumstances. The ambit of that estate cannot be cut by any text, rule or interpretation of Hindu law. Any adoption made by her after the Hindu Succession Act came into force can have no impact on her rights. The fiction of relation back in the case of adoption by a widow being based on Hindu law text as interpreted by the Courts, that fiction is abrogated to the extent it conflicts with the rights conferred on the Hindu female under Section 14 (1). The scope of Section 14 (1) cannot be limited by taking the aid of that fiction ²⁷⁵ Likewise her enlarged ownership cannot be divested by her subsequent remarriage ²⁷⁶ That a male member of a Hindu family governed by the Benares school of Mitakshara law is subject to restriction *qua* alienation of his interest in the joint family property is no ground for imposing such limitation on a widow acquiring an

(272) 1961 Cal 26, cf., *Shakuntala Devi v. Beni Madhav*, 1964 All. 165.

(273) *Bisauar Singh v. Pilabas*, 1972 M.P. 204.

(274) 1960 M.P. 156.

(275) *Punithapalli v. Ramalingam*, (1970) 2 S.O.J. 478; 1970 S.O. 1730, *Kisan v. Hari*, 1973 Mah. L.J. 906, *Jagdish v. Mohammad*, 1973 Pat. 110.

(276) *Jagdish v. Mohammad*, supra; *Bhuri Bai v. Shanta Bai*, 1968 Raj. 139; *Bhalabhai v. Jagadhar*, 31 Cut. L.T. 570 1 L.R. (1965) Cut 396

interest in that property by virtue of the Hindu Succession Act. She is not subject to any such restrictions²⁷⁷. By reason of her full ownership, she becomes competent to alienate the full estate thereafter freely without the need for any one's consent²⁷⁸. Any decree passed restraining the female owner from transferring the property ceases to be operative on her becoming full owner²⁷⁹. Likewise any decree passed for the appointment of a receiver for her estate while limited estate in a suit by reversioners ceases to be effective the moment her limited interest came to an end, by reason of the enlargement of her estate under Section 14 (1)²⁸⁰. As full owner she becomes a fresh stock of descent and on her death intestate the property will pass to her own heirs.²⁸¹ She is entitled under Section 30 to dispose of the property by will²⁸².

6. Retrospective effect.—The use of the expression “whether acquired before or after the commencement of this Act” shows that this section is intended to be retrospective in the sense that the acquisition might have been made even before the Act, in other words ‘the transformation of a limited estate of a Hindu woman into an absolute estate envisaged by this section applies also to properties acquired by a woman even prior to the Act, subject of course to the provisions of sub-section (2) of this section. When *Kamala Devi v. Bathuloti*²⁸³ was first reported there had been a good deal of confusion in the minds of the readers as to what, exactly was meant by the statement that Section 14 was retrospective. That they could not have meant and did not mean that the section had a retro-operation to validate the sales effected by the widow even prior to the Act without any benefit or necessity of the estate so as to prevent the reversioners from challenging the alienation had been clearly established by the subsequent decisions of the various High Courts and the Supreme Court.

In respect of property possessed by a woman in the sense of the property being in her actual or constructive possession, she becomes absolute owner after the Act even though she might have obtained the property either before or after the Act. In respect of such property, unless it comes under section 14 (2) no suit by a reversioner with reference to any alienation by the widow, though it be an improper or unjustified one can at all be maintained because in that property an absolute right to her is conferred by this section (*Dhruv Kanwar v. Laxman Singh*,²⁸⁴ *Kotturuswami v. Veerappa*²⁸⁵).

The operation of the section is attracted even when a matter is pending either in the trial court or in the Court of appeal (*Bhabani Prasad v. S.M. Sarat Sundary*,²⁸⁶ *Ram Ayodhya v. Raghunath*²⁸⁷, *Krishna Dassi v. Abhi Saha*²⁸⁸, *Kotturuswami v. Veerappa*²⁸⁹).

(277) *Sukh Ram v. Gauri Shankar*, (1968) 2 S.C.J. 122. 1968 S.C. 365

(278) *Kempanna v. Shankarajiah*, 1973 Mys. 66, *Mst. Sonekshi Kaur v. Smt. Bahura*, 1973 Pat. 477, *Hare Ram v. Harbans Singh*, (1973) 3 S.L.J. 88 [validity of alienation cannot be challenged.]

(279) *Ba Champa v. Chandrakota*, 1973 Guj. 227.

(280) *Harinath v. Visalakshamma*, (1969) 2 Mys. L.J. 287.

(281) *Subbalakshmi Ammal v. Ramalakshmi Ammal*, (1963) 2 M.L.J. 467

(282) *Jwala Narasimha Reddy v. Narayana*, (1978) 1 An. L.T. 407.

(283) 1957 S.C. 434

(284) 1957 M.F. 38

(285) 1959 S.C.J. 437 (1959) 1 M.L.J. (S.C.) 158; 1959 S.C. 577.

(286) 1957 C.I.L. 527

(287) 1957 P.T. 480.

(288) (1958) Cal. 671.

7. **Inheritance.**—The term “inherit” signifies acquisition by succession and not under a will. It is receiving property as heir on succession by descent⁽²⁸³⁾. It covers not only inheriting under the ordinary Hindu law but also taking as statutory heir⁽²⁸⁴⁾. Prior to the enactment of this Act any property acquired by a female Hindu by inheritance was held by her only as a qualified owner, whether the inheritance was to a male (*Bhagwande v. Myna Bai*,⁽²⁸⁵⁾ *Sheoshankar v. Debi Sahai*⁽²⁸⁶⁾, *Janakisetti v. Muriyala*)⁽²⁸⁷⁾, or to a female (*Sheoshankar v. Debi Sahai*⁽²⁸⁸⁾, *Hakum Chand v. Sital*⁽²⁸⁹⁾ *Mahendra v. Dakshina*,⁽²⁹⁰⁾ *Kailasanada v. Parashakta*⁽²⁹¹⁾). In places, governed by the Mithila and the Mayuka Law, movable property inherited by a female from whomsoever it might have been was taken by her as her absolute property (*Jagannath v. Surajdev*⁽²⁹²⁾, *Latai Rai v. Bhagwan*⁽²⁹³⁾, *Bagirati Bai v. Kanuji Rao*⁽²⁹⁴⁾). In the Bombay Presidency where a woman succeeded to the estate of another woman, or succeeded to the estate of a male as a *gotraja sapinda*, she took the property as absolute owner (*Gandhi v. Bai Jadab*⁽²⁹⁵⁾, *Baluanta Rao v. Baij Rao*⁽²⁹⁶⁾, *Kishan v. Babu*⁽²⁹⁷⁾, *Bithappa v. Savitri*⁽²⁹⁸⁾ *Madhaya Ram v. Dave*⁽²⁹⁹⁾). The female *gotraja sapindas* in the Bombay school were the females born in the gotra or family such as the daughter, sister, half-sister and father's sister and they took the property absolutely (*Bhagirati Bai v. Kanuji Rao*,⁽³⁰⁰⁾ *Bhau v. Raghunath*⁽³⁰¹⁾). In the case of widows of *gotraja sapindas*, the nature of the estate that they took depended upon whether they inherited to a male or to a female. If they inherited to a male they took a limited estate, but if to a female they took an absolute estate (*Bhau v. Raghunath*,⁽³⁰²⁾ *Gandhi*

(283) *Kameshwara v. Vajudoe*, 1972 A.P. 119, 47 *Ammal v. Subramania Asari*, 1966, 1 M.L.J. 411 1966 Mad 369

(290) *Rangaswami v. Chinnammal*, (1964) 1 M.L.J. 374 1964 Mad 187.

(291) 11 M.L.A. 487

(292) 25 All. 468.

(293) 31 Mad 521.

(294) 50 All. 232.

(295) 1936 Cal 34.

(296) 48 Mad 488

(297) 1-37 Pat 483

(298) 1936 Pat. 80

(299) 11 Bom 285.

(300) 24 Bom 192.

(301) 48 Cal 30

(302) 1925 Bom 24.

(303) 34 Bom 580

(304) 71 Bom. 739

(305) 11 Bom 285

306 30 Bom 29.

v. *Bhas Jodab*)³⁰⁷. Under the present section there is no distinction between the property inherited by a female Hindu being movable or immovable and between inheritance female to a and to a male. All properties inherited by a female heir, whether as a widow, daughter, mother, daughter-in-law, etc., will be taken by her as an absolute owner, and if the inheritance had been prior to this Act, even then the limited estate which she got by inheritance became transformed into an absolute estate under the provisions of this section.

The word 'possessed' in the section refers to possession at the date when the Act came into force. Hence a Hindu widow who acquired the property from her husband before the commencement of the Hindu Succession Act in a joint Hindu family must be deemed to possess the property within the meaning of this section. *Sukh Ram v. Gopu Shankar*.³⁰⁸

In *Shankara Rao v. Rajyalakshamma*³⁰⁹ where a Hindu died after the Hindu Women's Rights to Property Act and just before the passing of the Hindu Succession Act leaving behind him his widow and an adopted son and subsequent to the latter Act a suit was filed for partition by the adopted son of the widow, it was held that the interest which the widow had acquired in the property as representing the interest of the husband under the Hindu Women's Rights to Property Act was not a mere inchoate right by reason of there having been no partition prior to the Succession Act of 1956 but was quite a concrete and tangible right with possession which, therefore, became an absolute right in her under the provisions of S. 14 (1) of the Hindu Succession Act, 1956. Where a Hindu widow who had obtained rights in the family property under the Hindu Women's Rights to Property Act (1937) dies after the Hindu Succession Act of 1956 has come into force, her own heirs will take that interest as her absolute property even though the widow had not worked out her rights for securing a partition by metes and bounds. *Subbalakshmi Ammal v. Ramalakshmi Ammal*.³¹⁰ The interest which she got as a widow of a coparcener by reason of the provisions of the Hindu Women's Rights to Property Act becomes enlarged by reason of this section into an absolute interest not only inheritable by her own heirs but also alienable by her even without the consent of the other coparcener. *Madhusoodhan v. Ananthan*.³¹¹ *Rangaswami Naicker v. Chinnammal*,³¹² *Ranganayakamma v. Rajarajeswaramma*.³¹³

(307) 24 Bom 192

(308) 1962 All 18, See *Radhakrishna Reddy v. Controller of Estate Duty*, 1971 Ker. 202. [The position in Travancore, which gave a widow under the Mitakshara law only a limited estate stood altered by reason of S. 14 (1)]

(309) (1960) 2 An. W.R. 442 1961 A.P. 241

(310) (1963) 2 M.L.J. 467, *Narasimhachari v. Andalammal*, (1978) 2 M.L.J. 520 1979 Mad. 31; *Rabari v. Bas Mann*, (1976) 17 Guj. L.R. 729 [it is immaterial whether she had expressed a desire to effect partition or taken any steps in that behalf], *Basti Ram v. Ved Prakash*, 1974 P. & H. 112, *Jagabai v. Ram Khilwan*, 1975 M.P.L.J. 857, *Suketu v. Controller of Estate Duty*, (1975) 2 L.T.J. 376, cf., *Machiah v. Ponayya*, 1973 Mys. 1 [on her death, the property goes to her heirs], *Bas Champa v. Chandrakanta*, 1973 Guj. 227; *Soleppa Mudaliar v. Meenakshi Ammal*, (1970) 1 M.L.J. 707

(311) 1963 Orissa 183.

(312) 1964 Mad. 387

(313) 1964 A.P. 380, *Sayamurayana v. Sreethanma*, 1972 Mys. 247

Such enlargement did not in any way work a change in the character of the joint family or the widow's status as a member of such family or the karta's powers to represent the joint family including her interest.³¹⁴ By reason of such enlargement, a will by her though made prior to the commencement of the Hindu Succession Act would not become invalid, because she had the requisite power when the will took effect.³¹⁵

7-A. Devise—The position of a Hindu woman taking property under a devise has been examined in Section 404. Under the law prior to the Hindu Succession Act, if words were used conferring absolute ownership on the wife, unless the circumstances the case were sufficient to show that such absolute ownership was not intended, the wife would have power to alienate. No presumption should be drawn in the case of a gift in favour of a female that she is not to take an absolute estate. But in the case of a simple gift or bequest to the wife or widow without there being any words conferring absolute ownership, the presumption was held to be that she took only a limited estate. The same principles, it is submitted, would apply even in the case of gifts or bequests to the other female relations such as a daughter (*Mangamma v. Dorayya*³¹⁶, *Radha Prasad v. Ramesh Mansi*³¹⁷ or a daughter-in-law, *Brijlal v. Suraj Bihram*³¹⁸). The presumption of limited estate was applied by the Privy Council in respect of gift to a daughter *Radha Prasad v. Ramesh Mansi*³¹⁹. See also *Narayanaswami v. Gopalaswami*³²⁰, *Bibhabati v. Mahendra*³²¹, *Mt. Rameshwari v. Shital*³²², *Dorayya v. Mangamma*³²³. But the rule of construction was only to be applied where the terms of the instrument did not make it clear whether what was intended to pass was a limited estate or an absolute estate (*Ramachandra v. Ramachandra*³²⁴). See also *Maneklal v. Kehar*³²⁵ laying down that the life-estate conferred under a will may be distinct from what was ordinarily understood as a Hindu widow's estate, *Kanhiya Lal v. Deepchand*³²⁶. Thus where a father-in-law granted to his daughter-in-law certain property for her support and maintenance under an instrument and it recited that the daughter-in-law was to remain absolute owner (*matik mustakil*) of the property, the Privy Council held that the donee took an absolute estate in the property and not one which determined with her life (*Bishnath Prasad Singh v. Chandika*³²⁷). See also *Pratap*

(314) *Fathmunnissa v. Rajagopalacharyulu*, (1975) 2 A.P.L.J. 208

(315) *Sunderdevi v. Manakhand*, 1975 Raj 211

(316) 44 L.W. 685 1937 M.L. 100 71 M.L.J. 688.

(317) 35 C. 896 35 I.A. 118 12 C.W.N. 729 5 A.L.J. 460 10 Bom. L.R. 604 18 M.L.J. 287 (P.C.).

(318) 34 A. 405 39 I.A. 850 14 Bom. L.R. 827 23 M.L.J. 38 1912 M.W.N. 646 9 A.L.J. 802; 16 C.W.N. 745 16 I.C. 92 (P.C.)

(319) 35 I.C. 896 35 I.A. 118, 12 C.W.N. 729; 5 A.L.J. 460, 10 Bom. L.R. 604 18 M.L.J. 287 (P.C.).

(320) 46 M.L.W. 258 1938 M. 6

(321) 1938 C. 34 I.L.R. (1937) 1 C. 400.

(322) 14 P. 640; 1935 P. 401

(323) 69 M.L.J. 688 44 L.W. 684 1937 M. 100.

(324) 42 M. 289, 36 M.L.J. 906 52 I.C. 94

(325) 1938 B. 71.

(326) 48 Punjab L.R. 454

(327) 35 Bom. L.R. 341 37 C.W.N. 417 64 M.L.J. 302 60 I.A. 56 55 A. 61. 1983 P.C. 67; 37 L.W. 407; 1933 M.W.N. 239 1933 A.L.J. 347.

*Chand v. Mt. Mohini*³²⁸ *Kamala Prasad v. Murl*³²⁹ *Saraju Bala v. Jyotsirmoyee*³³⁰ a case of gift to daughter) In such a case any subsequent clause in the instrument providing for a gift over on the termination of the first donee's interest was inoperative and ineffective to cut down her absolute estate *Pratap Chand v. Mt. Mohini*³³¹ *Bhupati v. Chandi*³³² See also *Thayalai v. Kannammal*³³³ and *Govindbhai v. Dayabhai*³³⁴ for the validity of a gift over of what remains of a prior absolute estate See also *Subbomma v. Rama Naidu*³³⁵ for the position that it was permissible to create an interest analogous to a woman's estate with a gift over *Krishnaswami v. Srinivasan*³³⁶ (an absolute estate conferred on wife cannot be validly followed by a gift over after her death) So also any subsequent clause prohibiting alienation was to be rejected as being repugnant to the absoluteness of the estate created by the former clause (*Lala v. Dal Doer*³³⁷ *Umrav v. Baldev*³³⁷) Where a Hindu left a will devising his estate to a female as 'malik' with a proviso that in the event of her death his nephew was to be his heir, on the female surviving the testator, it was held that the female took an absolute estate and the gift over to the nephew had no operation (*Kamala Prasad v. Murl*³³⁸) The distinction between a repugnant provision and a defeasance provision is sometimes subtle but the general principle of law seems to be that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void But where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative If a gift over is to take effect, the terms of the bequest taken as whole must not confer an absolute estate on the first donee (*Rameshwar v. Sheo Lal*³³⁹) But it is permissible for a Hindu testator to confer on his widow inheriting his property full power of transfer over the same with a provision that any portion thereof which remains untransferred by her should descend to his own heirs (*Bishun Singh v. Thakurji*³⁴⁰) Where a Hindu bequeathed this property to be enjoyed by his widow till her death and provided that after the widow's death they should pass to his daughter and after her to her sons, it was held that the estate taken by the daughter as well as the widow was a limited estate which she would take under the

(328) 14 Lah 485 1933 Lah 365

(329) 1934 P 398 13 P 550 15 P L T 715

(330) 58 IA 270 59 C. 142 33 Bom L.R. 1257 1931 A L J 555 34 L W 51 1931 M W N 969 35 C W N 903; 61 M L J 501 1931 P C 179

(331) 35 G W N 390

(332) 1935 M. 704.

(333) 38 Bom L R 175 1936 B 201

(334) 45 L W 153. (1937) 1 M L J. 268 (1937) M W N 114

(335) (1945) 1 M L J 220

(336) 24 C. 406

(337) 14 L. 353; 1935 Lah 201.

(338) Supra.

(339) 14 Pat. 640. 1935 P. 401.

(340) 58 L W 47; 49 C.W.N. 184; (1945) 1 M.L.J. 91 1945 P.C. 30.

law of inheritance and that there was no vested remainder in the grand son which could be attached in execution of a decree against the grandson (*Ammanamma v. Venkata*).³⁴¹ It is possible to have a vested remainder after conferring a limited estate analogous to that of a woman's estate under the Hindu Law. See also *Mst. Bhagbuti v. Choudhury Bholanath*.³⁴²

While the above was the state of the law with reference to the nature of the estate taken by a female under a devise in her favour, under Section 14, any property acquired by a female Hindu under a devise is taken by her as full owner thereof. Unless the terms of the will present a restricted estate in such property, the presumption will be that the estate is absolute and any deduction from that absoluteness is to be made out by very clear and cogent indications or provisions in the will in question. Besides, the question has to be decided whether the property comprised in a will which purports to give it to a woman is property acquired by her under the will. It is possible for a woman to have acquired the property apart from the will and the will may purport to include that property and give it to her with a restricted estate. In such a case, it cannot be said that the acquisition by her is under the will though the will may deal with it or purport to give it to her. For instance, if a woman had died prior to the Act making a will, in respect of the property inherited by her from her husband, and under that will she had given only a limited estate to the daughter, the case will not come under sub-section (2) of this section because the property taken by the daughter would come to her not under the will which is invalid but as the heir of her father on the mother's death. She does not acquire the property under the will. Even though she had taken only a limited estate as the father's heir on the mother's death, that limited estate would become an absolute estate under this section in spite of the clear terms in the will of the mother making the estate a qualified one. Again, there may be a will by a surviving coparcener giving some property with a limited estate to the widow of a deceased coparcener. If that widow can show that as a matter of fact her husband had become divided prior to his death and the property given to the widow fell to the husband's share, she would take the property absolutely under this section because she takes it by inheritance and not by devise. The crucial question is, can it be said in the circumstance of any case where there is a will giving property to a woman with a restricted estate, that she has taken that property only under the will or *de hors* the will. If the answer is that but for the will she could claim no interest in the property, the restrictive terms of the will must prevail, making the estate in her hands in the property in question a limited one. If the answer is that even without the will the property can be regarded as taken by her by inheritance or acquired by her by other means the terms of the will purporting to restrict her right in the property in question can have no operation: See *Kotturuswami v. Veerappa*.³⁴³ Where only a life-estate had been conferred on the wife under her husband's will, having succeeded to the properties on the strength of the will she cannot have rights over and above that given to her under that will and cannot claim to have become absolute owner under the Act.³⁴⁴ Where a will simply recited that the wife shall remain in possession of the house and did not even prescribe any point of time and the widow was in possession of the family house without any condition attached when the Act

(341) 1 L.R. 1940 M 223; (1940) 1 M.L.J. 188 1940 M 210; 50 I.W. 729 1939 M.W.N. 1181.

(342) 24 W.R. 168.

(343) 1959 S.C.J. 437 (1959) 1 M.L.J. (S.C.) 158; (1959) 1 A.W.R. (S.C.) 158.

(344) *Mst. Karmi v. Amru*, 1971 S.C. 745; *Ashta Rao v. Union of India*, 1977 A.P. 277

came into force, she became the sole owner of the same under Section 14 (1).³⁴⁴ Notwithstanding that the will is legally ineffective as it related to ancestral property, a widow in possession under bequest of such property after her husband's death will have her right enlarged under Section 14 (1).³⁴⁵

8 Partition—Prior to this Act, a share allotted to a mother or a father's mother on partition, unless it had been transferred to her by way of absolute gift as *Stridhana* (*Sahab Rai v. Shafiq*³⁴⁷ *Balyes Chand v. Khetterpal*,³⁴⁸ see also the observations in *Mangal Prasad v. Mahadeo Prasad*,³⁴⁹) did not stand on a footing different from that on which property coming to her by way of inheritance had been placed and hence it was taken by her as a qualified owner, *Mangal Prasad v. Mahadeo Prasad*³⁴⁹ *Krishna Lal v. Nandeshwar*,³⁵⁰ *Bhagwantrao v. Punjaram*,³⁵¹ *Hriday v. Behari*,³⁵² *Hemangini v. Kedarnath*,³⁵³ *Nunni v. Phula*³⁵⁴ *Sashi Bhushan v. Hari Narain*,³⁵⁵ *Sital v. Sryam*³⁵⁶ (Mother)

But it was also possible that in a partition, a share might have been allotted to a female member with absolute rights for her in it and even before this Act she would have the right to deal with it as an absolute owner under the present section. Whatever the nature of the interest given to her at a partition, she now takes the property as full owner. Where a property is acquired by the female Hindu at a partition it is in virtue of a pre-existing right and such an acquisition does not fall under Section 14 (2) even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property.³⁵⁷ To restrict this interest under an instrument to a limited estate, it is necessary to establish that but for this instrument she cannot have taken any interest in the property. For instance under the Hindu Women's Rights to Property Act of 1937, the interest which the widow of a coparcener took was the limited estate of a woman under the Hindu Law. If subsequently to her husband's death and her taking the husband's interest as his heir under the Hindu Women's Rights to Property Act, there was a partition in the family and she was allotted some properties for her share under an instrument of partition with a limited interest in those properties, she would take absolutely and as full owner in spite of the restriction in the instrument of parti-

(345) *Manabala Chetty v. Ramaswami Chetty*, (1971) 1 M.L.J. 127

(346) *Jah v. Ramjahan*, 1973 Cur. L.J. 454

(347) 101 I.C. 425; 26 L.W. 82; 53 M.L.J. 507; 31 C.W.N. 972, 1927 M.W.N. 480; 1927 P.C. 101.

(348) 11 Beng. L.R. 459

(349) 39 I.A. 121; 34 A. 734; 16 C.W.N. 409; 9 M.L.J. 263; 14 Bom.L.R. 220; 22 M.L.J. 462; 1912 M.W.N. 324; 14 I.C. 1000.

(350) 4 Pat. L.J. 38

(351) 1938 N. 1

(352) 11 C.W.N. 89

(353) 16 I.A. 115; 16 C. 769.

(354) 50 A. 22; 1927 A. 679.

(355) 48 C. 1059; 25 C.W.N. 970; 1921 C. 202.

(356) 1944 Oudh. 78.

(357) *Tulasamma v. Seetha Reddy*, (1978) 1 S.G.J. 29; 1977 S.C. 1944 Cl.; *Acharan v. Sarjukul*, 1976 Bom. 272; *Sarat Lakshmi Deb v. Sibi Kumar Deb*, 78 Cal. W.N. 357; *Ram Jag. Misra v. Director of Consolidation*, 1975, All. 151 [holding to the contrary is not good law] likewise *Valmuregappa v. Lakshmana Perumal*, (1974) 2 M.L.J. 293.

tion because even without the instrument she would be taking a share in the property which under this section would have become absolute property in her hands. Where a female Hindu had acquired an interest under the Hindu Women's Rights to Property Act in the properties of her husband which were later on partitioned by metes and bounds, the mere fact that the partition was by arbitration leading to an award and a decree would not bring the matter under Section 14 (2).³⁵⁸ The test, as already indicated, is to find out whether the acquisition is under the instrument or otherwise. If even without the instrument she has an interest which interest becomes enlarged into an absolute interest by the enactment of this section, that absoluteness cannot be taken away by an instrument of partition giving her a qualified interest in the property. No doubt the word "instrument" in Sub-section (2) is comprehensive enough to take in an instrument of partition. But the proper construction of sub-section (2) appears to be that it relates to acquisitions under instruments in cases where but for the instruments she can have no right in the property acquired.

If there is no instrument at all in a particular case and the partition is purely oral as it well can be under the Hindu Law, the fact that the arrangement in the oral partition is that a widow who has been given some property in that partition, should take that property as a qualified owner would not prevent her from holding it as full owner under the first sub-section, because there is no instrument or a document like a decree or order of a civil Court or an award, or a gift, or a will when alone the restriction therein is permitted to operate.

Where in a suit for partition before the commencement of the Act a preliminary decree was passed declaring the share of a widow of a coparcener, that share must be considered to be possessed by her within the meaning of section 14. *Munnalal v. Rajkumar*.³⁵⁹

9 Maintenance grants—By virtue of the Hindu Succession Act, where a widow is placed in possession of certain joint family property in lieu of her right to maintenance she would hold such property as full owner under section 14 (1).³⁶⁰ Property given to a widow in lieu of maintenance with no power of alienation gets enlarged under section 14 (1).³⁶¹

Under the earlier Hindu Law, "Maintenance awarded to a woman, whether by agreement or decree of Court, whether during coverture (*Manilal v. Bai Rewa*),³⁶² or widowhood, whether in the shape of money (*Subramanian v. Arunachalam*,³⁶³ *Nellai Kumari v. Marakathammal*)³⁶⁴, or by way of absolute transfer of immovable property [*Mangal Prasad v. Mahadeo Prasad*,³⁶⁵ *Ramachandra v. Vijayaraghavulu*,³⁶⁶ *Sri Rajah Venkata v. Raja Rao*,³⁶⁷ see also *Dhup Nath v.*

(358) *Badri Prasad v. Smt. Kanoo Das*, 1970 2 S.C.J. 1141 1970 S.C. 1963.

(359) 1962 S.C. 1493.

(360) *Krishna Das v. Venkayya*, 1973 S.C. 361, see also *Sellammal v. Nallammal*, 1977 S.C. 1263.

(361) *B.B. Petil v. Gangabai*, 1972 Bom. 16 approved in *Thulasamma v. Sesha Reddy*, 1977 S.C. 1944. *Channamma v. Langanma*, 1972 Mys. 333, *Haanmangoudi v. Hanamangoudi*, 1972 Mys. 286.

(362) 17 B. 754.

(363) 28 M. 1.

(364) 1 M. 166.

(365) 34 A. 234 9 A.L.J. 263 16 C.W.N. 409 1912 M.W.N. 324 14 Bom. L.R. 220 22 M.L.J. 462 39 A. 121 14 I.C. 1000 (P.C.).

(366) 31 M. 349.

(367) 17 M. 150.

Ram,³⁶⁸ where the transfer was not an absolute one: *Bangaru v. Mangammal*,³⁶⁹ was her Stridhana property. Any property purchased by her out of her maintenance allowance was also her absolute property *Peribhasari v. Sendamurai*,³⁷⁰ as also savings out of the maintenance given to her *Bankim Bihari v. Prabodh Chandra*,³⁷¹ *Ram Das v. Ram Sewak*,³⁷² and arrears of maintenance *Deyabhadra*, 1—1—15; *Janardan v. Sonabai*,³⁷³

In *Thulasamma v. Sesha Reddy*,³⁷⁴ the Supreme Court points out that a Hindu woman's right to maintenance is a personal obligation so far as the husband is concerned and it is his duty to maintain her even if he has no property, that if the husband has property then the right of the widow to maintenance becomes an equitable charge on the property; that though it is not a right to property it is a right in property which can be enforced by the widow who can get a charge created for her maintenance on the property either by an agreement or by obtaining a decree from the Civil Court, that where a Hindu widow is in possession of the property of her husband she is entitled to retain possession in lieu of her right to maintenance unless the person who succeeds to the property or purchases the same is in a position to make due arrangements for her maintenance; that the right to maintenance is undoubtedly a pre-existing right which existed in the Hindu law long before the passing of the Hindu Women's Rights to Property Act of 1937 or the Hindu Women's Right to Separate Residence and Maintenance Act of 1946, and hence where property is acquired by a Hindu female in lieu of her right to maintenance it is in virtue of a pre-existing right and such acquisition falls under section 14 (1) and she becomes the full owner of such property. Property acquired by a Hindu female under a compromise in lieu of or in satisfaction of her right to maintenance would fall under section 14 (1) and not under section 14 (2), notwithstanding that the compromise prescribes a limited estate,³⁷⁵ likewise where property is acquired under a family arrangement³⁷⁶ or under a separate arrangement³⁷⁷ or under a will³⁷⁸. A female Hindu in possession of family property after her husband's death in exercise of her powers of lien as to provision to be made for her maintenance will get the benefit of section 14 (1) and it is not necessary that the possession by the female must be that of an owner or limited owner³⁷⁹. Occupation of a family house in virtue of her right of residence with claim of

(368) 54 A 366 1932 A 662

(369) 59 L.W. 643

(370) 8 M.L.T. 284 8 I.C. 385

(371) 1934 C 284

(372) 1935 O.W.N. 596 1935 O 365

(373) 1941 N.L.J. 609

(374) (1978) 1 S.C.J. 29 1977 S.C. 1944, 1940 See also *Santhosham Kachapalega Gurukul v. Subrahmanya Gurukul*, 1977 S.C. 2024, *Sellamini v. Nellammal*, 1977 S.C. 1265; *Nanka Singh v. Smt Chanda*, 1974 Puri. 220.

(375) *Thulasamma's case* supra, *Omeshwar v. Swami Nath*, 1970 Pat. 348. See further *Hari Das v. Shri Ram*, 1979 H.P. 41, *Sri Ram v. Smt. Hukmi*, 1979 H.P. 460. See however *Pattabhiraman v. Periyatham*, (1970) 2 M.L.J. 331 1970 Mad. 257; *Shiva Tujan v. Jamuna*, (1963) I.L.R. 47 Pat. 1118.

(376) *B.B. Patel v. Gangobai*, 1972 101 L.J. 16; *Radha Bai v. Bhim Rao*, 77 Bom. L.R. 210: 1975 Mah. L.J. 394, *Nand Singh v. Neecharator Singh*, 1975 P & H. 55, *Lakshmi Devi v. Shankar Lal*, 1974 Raj. 147. But see *Sethurama v. Sathu*, (1970) 83 L.W. 226; *Subbu Naidu v. Rajammal*, (1976) 2 M.L.J. 205 [no longer good law in view of *Thulasamma's case*].

(377) *Mst. Gammoti v. Shankar Lal*, 1974 Raj. 47.

(378) *Ram Lal v. Smt. Shanon*, 1974 Cur. L.J. 345 [will imposing restriction on alienation.]

(379) *Lamba v. Manohar*, 1978 Bom. 83

maintenance in addition to such right decreed attracts Section 14 (1)³⁸⁰. If specific property is given to a widow in lieu of her right in result it becomes her absolute property under Section 14 (1).³⁸¹

10 Maintenance grant and conversion or unchastity—Under Hindu law if the right to maintenance is unconditionally secured to her under her husband's will, her unchastity does not work its forfeiture *Parami v Mahadevi*³⁸². Again, where maintenance was awarded under a compromise in respect of her claim to succeed to certain properties as her husband's it cannot be withheld on the ground of her unchastity (*Bhup Singh v Lochman*,³⁸³ *Anandi v Lakshmi Chand*)³⁸⁴. Where under a deed of arrangement between two brothers constituting a Hindu joint family, they agreed that on the death of one of them, his widow should have and enjoy for her life an interest in a moiety of the joint property her position is like that of a widow having inherited a widow's estate so as to make her estate non-forefeitable by her subsequent unchastity, and not like that of a widow having only a right to maintenance which she will lose if she becomes unchaste *Lakshmi Chand v. Mt Anandi*,³⁸⁵ *Chhabraji v Balagobind*³⁸⁶. If the widow who has been unchaste reforms and leads a moral life, she becomes entitled to what is known as starving maintenance, that is, maintenance which will cover her food and raiment which will be just enough to support her life, (*Ram Kumar v Mt Bhagwanrao*³⁸⁷, *Bhikubai v Hariba*³⁸⁸, *Roma Nath v Rajnaimoni*³⁸⁹, *Sathyabhama v Kesavaacharya*³⁹⁰ *Parami v. Mahadevi*³⁹¹). But a widow does not forfeit her right to maintenance by choosing to live away from her husband's relations unless she does so for immoral or improper purposes, *Ekradeshwari v Hanashwari*³⁹², *Perthee Singh v Raj Mozer*,³⁹³

(380) *Muthu Shettar v Chokka Shettar*, (1975) 2 M.L.J. 232 88 L.W. 602

(381) *Kunimgauri v Umaben*, 1975 Guj. 126. Cl., *Raj Kumar v Prem Parkash*, 1972 P & H. 473 [right under husband's will to widow to reside for life in any part of the property she was permitted to occupy by her son is not possession "acquired" by her], *Rao Raja Teja Singh v. Hastimal*, 1972 Raj. 132 [right of residence not equatable with proprietary interest]

(382) 34 B. 278 4 I.C. 960 12 Bom. L.R. 156.

(383) 26 A. 321.

(384) 1932 A.L.J. 207 1933 A. 190

(385) 62 I.A. 260-57 A. 672; 37 Bom. L.R. 849-42 M.L.W. 461 1935 A.L.J. 1163-1935 M.W.N. 1132 39 C.W.N. 1223; 69 M.L.J. 380 1935 P.C. 180

(386) 1940 Oudh 256.

(387) 56 A. 392; 1934 A.L.J. 120; 1934 A. 78.

(388) 49 B. 459; 1925 B. 153; 27 Bom. L.R. 13.

(389) 17 Cl. 674.

(390) 30 M. 658; 29 I.C. 397; 29 M.L.J. 47.

(391) *Supra*

(392) 8 P. 240; 56 I.A. 182; 33 C.W.N. 637; 1923 A.L.J. 695; 31 Bom. L.R. 816; 30 L.W. 1; 57 M.L.J. 50; 1929 M.W.N. 468.

(393) 12 Beng. L.R. 238 (P.C.).

Goikibat v Lakshmidas,³⁹⁴ *Siddesary v. Janardan*,³⁹⁵ *Srinioasa v Laskhmi*³⁹⁶, *Parwarthibai Chaitru*³⁹⁷

II. Gift—The position with reference to gifts to a Hindu woman prior to the Hindu Succession Act, 1956, was as follows

"Property gifted or bequeathed to a female in her maiden state was her absolute property whether the gift be from relations or strangers (*Mitokshara*, u-2-10, *Venkata v Venkata*³⁹⁸ *Judonath v. Busunni*³⁹⁹ *Dayabhaga*, iv-1-20) Properties gifted at the time of marriage to the bride, whether by relations or strangers either *Adhyagni* or *Adhyavahanika*, were the bride's *Stridhana*. Properties given to a woman subsequent to her marriage might have been given to her either by her husband or by others. The later judicial view seems to be that in the absence of words in the deed indicating the contrary intention, the presumption is that the donee took the property as an absolute owner and this view seems to be more in consonance with the present day sentiment of the Hindus which, owing to the influence of western civilisation and culture, abhors any distinction being created in the legal rights of parties, merely because of sex (*See* section 404, *Hilasing v Udesing*)⁴⁰⁰ Properties given or bequeathed to a woman by her relations or strangers during coverture (*Salemma v Lutchmana*,⁴⁰¹ or widowhood (*Bai Indor v Rames Janaki*⁴⁰² *Salemma v Lutchmana*,⁴⁰³ *Ram Gopal v. Varan*,⁴⁰⁴ *Basanta Kumari v. Kamakhayya*,⁴⁰⁵ *Bai Narmada v Bhagwantrao*,⁴⁰⁶) were her *Stridhana*, except that under the *Dayabhaga* and the *Mithila Schools*, property given by a stranger during coverture was subject to her husband's dominion and became her absolute property only after his death (*Dayabhaga*, iv-1-20)

Under Section 14 of the present Act, any gift to a Hindu woman from any person, whether a relation or not, whether made before, at or after her marriage, shall be held by her as a full owner and not as a limited owner. A female Hindu in continuous possession of property under a gift till the coming into force of the Hindu Succession Act becomes the full owner thereof by virtue of Section 14 (1)⁴⁰⁷ Under sub-Section (2), however, any property acquired by way of gift creating an independent and new title in favour of the female for the first time will be taken by her with restricted interest therein if the terms of the gift prescribe a restricted estate in such property⁴⁰⁸ The question whether Sub-section (2) applies

(394) 14 B 490.

(395) 29 C. 557 6 C.W.N. 530.

(396) 28 L.W 328. 1928 M. 16; 54 M.L.J. 530

(397) 35 B. 131.

(398) 1 M. 281.

(399) 11 Beng. L.R. 286.

(400) 39 Bom. L.R. 1217- 1938 B 125

(401) 21 M. 100; 8 M.L.J. 14.

(402) 1 C.L.R. 318 5 I.A. 1.

(403) 33 C. 315.

(404) 32 I.A. 181; 33 C. 23.

(405) 12 B. 505.

(406) *Jagbir Singh v. Kesar Singh*, 1973 R.L.R. 740; *Smt. Chinit v. Smt. Durga*, 1968 Delhi 264 (F.B.).

(407) *Thimappanna v. Sanku Bhatt*, (1978) 1 S.C.J. 29; 1977 S.C. 1944.

a) to oral gifts has been answered in the affirmative by the Punjab High Court in *Blonde v. Dunchand*⁴⁰⁸ on the ground that the expression "or any other instrument" which follows does not necessarily narrow down the scope of the expression 'gift' to a written instrument if there can be a valid oral gift, as in some parts of the country where the Transfer of Property Act has no application. But it is not easy to agree with this conclusion. The entire range of the provision seems to take in only instruments whether they be gifts, wills or decrees, etc. The intention of the Legislature being clear that the widow or woman in possession of property should be declared an absolute owner of the same except as provided under Section 14 (2) the latter provision has to be construed very strictly and such strict construction permits of an answer only to this effect that oral gifts though valid in law do not come within the purview of sub-Section (2) of this section. The terms of an oral gift or will must necessarily be vague and difficult to prove and it is a matter of extreme doubt whether the Legislature intended to give scope for perjury and fraud by letting in evidence of oral arrangements.

Any conditions in a will or gift prohibiting alienation (*Chundi Churn v. Siddheswari*⁴⁰⁹ *Surajbala v. Jyotirmayee*⁴¹⁰, *Tagore v. Tagore*⁴¹¹ *Muthukumara v. Anthony*⁴¹² *Rukminibai v. Laxmibai*⁴¹³ or partition (*Ananitha v. Nagamuthu*⁴¹⁴ *Narayana v. Kannan*⁴¹⁵ or postponing partition of (*Rasikshori v. Debdramath*⁴¹⁶) or restricting (*Bhasdas v. Bai Gulab*⁴¹⁷ *Surajbala v. Jyotirmayee*⁴¹⁸) the interest in the absolute estate created under the instrument is invalid and the bequest or gift is good (*Umrao Singh v. Baldev Singh*⁴¹⁹ *Narayana v. Kannan*⁴¹⁵ *Rameshwar v. Balraj*⁴¹⁹ *Muthukumara v. Anthony*⁴¹²). As was observed by the Judicial Committee in *Tagore v. Tagore*⁴¹¹ if the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected as being repugnant to, or as being an attempt to take away, the power of transfer which the law attaches to the estate which the donor has sufficiently indicated his intention to create, though he adds a qualification which the law does not recognise.

A condition in a gift or other transfer of property restraining alienation is dealt with in Section 10 of the Transfer of Property Act and a restrictive condition repugnant to the interest created is dealt with in Section 11 of the Transfer of Property Act. These sections run as follows:

(408) 1963 Punj 34 I L.R. (1962) 2 Punj 432

(409) 16 C. 71 15 I.A. 149 (P.C.)

(410) 58 I.A. 270 59 C 142 1381 A.L.J. 555 35 C.W.N. 903; 34 L.W. 51; 33 Bom. L.R. 1257 1931 M.W.N. 989 61 M.L.J. 501 1931 P.C. 179.

(411) 1 A Sup. 47 18 W.R. 359 (P.C.); 9 Beng. L.R. 377.

(412) 38 M. 867 24 I.C. 120.

(413) 44 B. 304; 1920 Bom. 73

(414) 4 M. 200.

(415) 7 M. 315.

(416) 15 C. 409.

(417) 46 B. 153; 49 I.A. 1; 20 A.L.J. 289; 24 Bom. L.R. 551; 26 C.W.N. 129; 42 M.L.J. 385; 15 L.W. 412; 1922 P.C. 193.

(418) 14 Lah. 333; 143 I.C. 615 34 P.L.R. 665; 1933 L. 201.

(419) 1935 A.L.J. 1133; 37 Bom. L.R. 862; 40 C.W.N. 8; 1935 M.W.N. 1122; 1936 P.C. 196.

"Section 10.—Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: Provided that property may be transferred to or for the benefit of a woman not being a Hindu, Muhammadan or Buddhist, so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Section 11.—Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof."

An interesting point arose in *Smt. Chinti v. Smt. Daultu*⁴²⁰ where a Hindu widow made a gift of property to her daughter prior to the Act and the question was whether by the daughter continuing in possession of that property after the Act she would become an absolute owner under Section 14 (1) even though if the donee was a male he would get only a limited interest which alone the widow could pass under the gift. It was held that the section is perfectly clear despite the anomaly and that the daughter would become the absolute owner of the property. A Full Bench decision of the Punjab High Court⁴²¹ has dissented from *Chinti's case*⁴²⁰ and held that a female possessed of land under a gift made by a limited owner prior to the coming into force of the Hindu Succession Act does not become a full owner after the Act came into force. According to the Full Bench the language of the *Explanation* to Section 14 (1) does not provide a key to the interpretation of that subsection which should be construed in the light of its historical background so as to avoid anomalies and that there is no compulsion either in the language of Section 14 which necessitated the acceptance of such anomaly as inherent. This reasoning loses its force in view of the Supreme Court's calling for a most expansive interpretation to the language of Section 14 (1) in *Thulasamma's case*.⁴²² That apart, the donee in the Punjab case was a female Hindu who had "acquired the property" in one of the modes mentioned in the *Explanation*, namely a gift, and was in "possession" thereof at the time of the passing of the Act. No restricted estate had been limited under the deed. Every requirement of Section 14 (1) being satisfied, she would become full owner automatically. The fact that the donor was herself a limited owner may not be material. *Chinti's case*,⁴²⁰ raises the question whether to get the benefit of Section 14 (1) the acquisition or the transfer must be with the intention or animus or consciousness that the person in possession under the acquisition or transfer has the full title to the property. If the woman in possession came by it without title as for instance by trespass or without real right the fact of possession cannot lend to it the right to possession and make the woman an absolute owner.

12. Acquisition by a woman by her own skill or exertion.—The position as regards the interest of a woman in a self-acquisition prior to the Hindu Succession Act, 1956 is summarised in Section 473 as follows:

(420) 1968 Delh 264 (F.B.).

(421) *Parameshwari v. Santakshi*, 1977 P & H 141 (F.B.); See also *Anadi Banghu v. Chanchala Bala*, 1976 Cal 303, *Sulachana Kaur v. Dasmah*, 1970 Pat. 488.

(422) (1978) 1 S.C.J. 29; 1977 S.C. 1944.

Property acquired by mechanical arts or by her own individual skill and industry during her maidenhood or widowhood is held to constitute her Stridhana (*Subrahmanian v. Annasahalam*),⁴²³ according to all the schools. Property acquired by such means even during coverture is Stridhana (*Muthu Ramakrishna v. Marimuthu*⁴²⁴, *Manumma v. Krishna*),⁴²⁵ except under the *Dayabhaga* where it becomes her absolute property only after her husband's death. Where acquisitions are made in a joint trade conducted by both the husband and wife, her interest passes after her death to her own Stridhana heir and not to the husband or his heirs (*Muthu Ramakrishna v. Marimuthu*,⁴²⁴ *Manumma v. Krishna*⁴²⁵).

Section 14 of the Hindu Succession Act, 1956, is clear and categorical that an acquisition by a woman by her own skill or exertion is her absolute property, whatever may be her status at the time of such acquisition, whether she be a maiden, a woman under coverture or a widow. This is quite consistent with the modern notions of equality between the sexes and there is no reason why when a male is to take the property acquired by him by his own self-exertion as full owner, a woman should be in a different or a worse position in respect of the property self-acquired by her. In respect of such property she enjoys all the rights of a full owner including powers of alienation by gift, sale, mortgage etc.

13 Purchase.—Even under the Hindu Law as it obtained prior to the enactment of the Hindu Succession Act, where a woman purchased property, the presumption was that it was her absolute property. If she purchased property with the income from the estate inherited by her from another and held by her as a limited owner, even such purchase would enure to her benefit as her absolute property unless it could be shown that she treated the new acquisition as an accretion to the inherited estate. The position is discussed in Section 520

“The presumption in the case of properties acquired by Hindu widows and other qualified owners is that they are self-acquisitions, and the onus is on those who assert the contrary (*Ramappa v. Mahalakshmi*)⁴²⁶. This presumption holds good even when the widow purchases property out of the savings from her limited estate (*Akkanna v. Venkayya*),⁴²⁷ *Jamuna Prasad v. Ram Padurali*,⁴²⁸ *Bharosa v. Manjan*,⁴²⁹ *Keshavu v. Maruti*,⁴³⁰ *Parbati v. Baijnath*,⁴³¹ *Sriram v. Jagadamba*,⁴³² *Nirmala v. Deva*,⁴³³ *Dulhim v. Baijnath*,⁴³⁴ *Prabhakar v. Sarabai*,⁴³⁵ *Suryappa v. Mangappa*.”⁴³⁶ This presumption however, has no place where the acquisition is

(423) 28 M. 1 (F.B.).

(424) 38 M. 1036 26 M.L.J. 532; 24 I.C. 363.

(425) 1933 R. 347.

(426) 14 L.W. 33 64 I.C. 481 1921 M.W.N. 434 1922 M. 357

(427) 25 M. 351 12 M.L.J. 5.

(428) 1937 Pat. 619; 18 F.L.T. 765

(429) 54 A. 1014.

(430) 46 B. 37.

(431) 1936 P. 200 14 P. 518

(432) 43 A. 374 1921 A. 11 19 A.L.J. 129 (F.B.)

(433) 55 C. 269 1927 C. 868.

(434) 14 Pat. 518 16 Pat. L.T. 713 1936 Pat. 200.

(435) I.L.R. 1943 Nag. 779. 1943 Nag. 233

(436) 1940 M.W.N. 19

made with the aid of the husband's estate, either by a sale of a portion thereof or with money raised on the security of it. The whole question, apart from presumption as above laid down, is one of intention gatherable from the circumstances of the case and the acts and conduct of the widow in respect of the new property (*Suraj Prasad v Gulab*,⁴³⁷ *Joychand v. Shyamcharan*,⁴³⁸ *Venkata v Surendra*,⁴³⁹) or instructs her husband's bankers to consolidate the principal and interest at the end of each year and treat the aggregate amount as a fresh deposit (*Narayanan v. Suppiah*,⁴⁴⁰), or purchases fresh shares in property wherein her husband had already acquired some shares (*Kula Chandra v. Bama Sundari*⁴⁴¹) See also *Jagamath v. Suraj*⁴⁴², *Joychand v. Shyamcharan*,⁴⁴³ or makes a single gift of both the original estate and the after-acquisition (*Im Dutt v. Hansutti*,⁴⁴⁴) or in any other way treats them in the same manner (*Kula Chandra v. Bama Sundari*⁴⁴¹ *Ganda Koor v. Koor Oodey*⁴⁴⁵ *Sheelochun v. Sahib*,⁴⁴⁶ *Suraya v. Mengaya*⁴⁴⁷) (purchase of what was formerly part of husband's estate with blended funds consisting of moneys belonging to the husband's estate and other moneys) her conduct would point to an accretion to the original estate. If, on the other hand, the circumstances do not warrant the inference of an intention on the part of the widow to hold the after-acquired property as a part of her husband's estate, the plea of accretion has no foundation, *Wahid v. Tori*,⁴⁴⁷ *Perbati v. Bajnath*⁴⁴⁸ Thus, where a widow acquires with the aid of borrowed money, but without detriment to the husband's estate, a property by exercising a right of pre-emption vested in her as her husband's heir (*Sri Ram Jankin v. Jagadamba*⁴⁴⁹ but see *Bhardia v. Mamboi*,⁴⁵⁰) the property acquired is not an accretion to her husband's estate, even though but for her being her husband's widow, she could not have made the acquisition (*Mahna Singh v. Thaman Singh*⁴⁵¹) Again, where a widow purchases land with her own savings and soon after deals with it as her own absolute property by mortgaging it or making a gift of it (*Keshav v. Maruti*,⁴⁵² *Akkanna v. Venkaya*,⁴⁵³ *Wahid v. Tori*,⁴⁴⁷) the after acquisition of the widow even though with the savings from the original estate, cannot be held to be its accretion. But

(437) 1937 A 197

(438) 1942 Cal 448

(439) 31 M. 321 18 M.L.J. 409

(440) 43 M. 629 11 L.W. 418; 1920 M.W.N. 248 56 I.C. 639; 38 M.L.J. 437

(441) 41 C. 870 22 I.C. 701

(442) 1937 P. 483

(443) 10 C. 324 10 I.A. 150 (P.C.).

(444) 14 Beng. L.R. 159; 2 Suth. 975.

(445) 14 I.A. 63; 14 C. 387 (P.C.)

(446) 1940 M.W.N. 19.

(447) 35 A. 551; 21 I.C. 91, 11 A.L.J. 856.

(448) 1936 P. 200 14 P. 518

(449) 43 A. 374 1921 A. 11; 19 A.L.J. 129 (F.B.).

(450) 54 A. 1014 1932 A.L.J. 875; 1932 A. 690.

(451) 11 Lab. 393 1930 L. 1010.

(452) 46 B. 37; 1922 B. 144; 23 Bom. L.R. 303

(453) 25 M. 351 12 M.L.J. 6.

if the estate gets enlarged either by action of the Government (*Subbaraya v. Ayyaswami*,⁴⁴⁴ *Kashy Prasad v. Unda Kunwar*,⁴⁴⁵ *Narayan v. Chengalamma*,⁴⁴⁶ *Vangala v. Vangala*,⁴⁴⁷ but see *Palaniandi v. Valayudham*⁴⁴⁸) or by the act of the widow not in her own independent right but as representing her husband's estate, as for instance, by purchasing the rights of others in the estate (*Nabakishore v. Upendrakishore*⁴⁴⁹), or by a compromise with the superior holder (*Ram Shankar v. Lal Bahadur*)⁴⁵⁰ the widow takes the interest representing the enlargement only as a qualified owner. See however (*Palaniandi v. Valayudham*)⁴⁵¹ a case of an enfranchisement of a Karmam service man in favour of a widow). These principles apply even in the case of properties acquired by other limited female holders like the daughter, the mother, etc.

Under Section 14 of the Hindu Succession Act, the purchase made by a woman would be her absolute property unless it can be shown that she is only a *benamidar* or that she had purchased it in trust for the benefit of somebody else. When the question arises, whether a purchase made by a woman is in her own right and for her own benefit and not *benami* for the benefit of another, the answer often depends upon the intention of the woman and the source of the consideration for the purchase. It may often happen that a husband may purchase property in the name of his wife without any intention that the wife should be the owner of the property purchased. Evidence has got to be considered as to what exactly was the intention of the husband in making such a purchase. The presumption is as already said that every ostensible owner is also the real owner and the onus is upon the person alleging a transaction to be *benami* to make out the allegation. The position of *benami* transactions is summarised in Section 324.

14 Prescription—Both prior to the Hindu Succession Act, 1956 and after the said Act the rights of a woman when she acquires property by adverse possession are absolute, her position being that of a full owner. The title acquired by adverse possession is independent of Hindu Law and has no reference to the sex of the acquirer. Hence property acquired by adverse possession by a Hindu female, whether during coverture, widowhood (*Hubraj v. Chandrabati*,⁴⁵² *Mukh Ram v. Mt. Sundar*,⁴⁵³ *Moh'm Chander v. Kashi Rani*,⁴⁵⁴ *Kanhai Ram v. Amrit*,⁴⁵⁵ *Adya v. Mt. Chandrawati*,⁴⁵⁶ *Saigar v. Kishore*,⁴⁵⁷ *Sham v. Dah*,⁴⁵⁸ *Varada Pillai v.*

(454) 32 M. 86; 1 I.C. 749.

(455) 30 A. 490 5 A.L.J. 590

(456) 10 M. 1

(457) 28 M. 13.

(458) 52 M. 6 28 L.W. 530 55 M.L.J. 579 1929 M.W.N. 723; 1929 M. 93.

(459) 1922 P.C. 39 15 L.W. 417; 20 A.L.J. 22; 42 M.L.J. 253; 1922 M.W.N. 95; 26 G.W.N. 322
3 Pat. L.T. 311; 24 Bom. L.R. 346

(460) 1 Luck. 98 1925 O. 277

(461) 52 M. 6.

(462) 1931 Oudh 89; 130 I.C. 849; 6 Luck. 519

(463) 1934 Lah. 270

(464) 2 G.W.N. 161.

(465) 32 A. 189 7 A.L.J. 153; 5 I.C. 207

(466) 1934 Oudh. 265

(467) 46 I.A. 197; 42 A. 152.

(468) 29 I.A. 132 29 C. 664.

Jeeranathanammal,⁴⁶⁹ *Rokides v. Sukhdeo*,⁴⁷⁰ *Suraj v. Tilakdhari*,⁴⁷¹ or maidenhood, becomes her Stridhana and should descend to her Stridhana heirs (*Rampal v. Bajrang*,⁴⁷²), except where from the circumstances of any particular case it is perfectly clear that she intended to hold adversely in her character as the heir of the last male-holder and not in her own individual capacity. (See also section 526, *L. Ganes v. Sajjehond*,⁴⁷³ *Parbati v. Ram*,⁴⁷⁴ *Dhuryati v. Ram*,⁴⁷⁵ *Chaitan v. Roshan*,⁴⁷⁶). The exception above mentioned can have no application to an acquisition by prescription after the enactment of Section 14 and even if a woman had prior to the Act, acquired a property by adverse possession in her character as the heir of the last male-holder and not in her own individual capacity, the property thus acquired by prescription would become her absolute property and she will hold it as full owner thereof with unqualified rights of enjoyment, alienation etc. *Mst Harmal Kaur v. Mst Kartar Kaur*,⁴⁷⁷ The period of prescription may be made by two continuous periods, one before the Act and the other after the Act provided there is no break between the two.

15 Acquired in any other manner whatsoever.—This heading would cover under the old Hindu Law for instance modes of acquisition by a woman under a compromise and by gains, of prostitution. If a limited female holder enters into a *bona fide* compromise of disputes with the reversioners and obtains certain properties thereunder, the question whether she takes them as Stridhana or only as a qualified owner would depend upon the intentions of the parties (*Nathu v. Babu*),⁴⁷⁸ and the nature of the claim put forward by the woman. If she had put forward the claim as the absolute owner of certain properties and obtains some of them she takes them as absolute owner. If on the other hand both the claim and the compromise proceeded on the footing of her being only the representative of the estate of the last holder, she takes the property only as a qualified owner *Karimuddin v. Gobi*,⁴⁷⁹ *Sambasiva v. Venkateswara*,⁴⁸⁰ *Rabutti v. Sibchunder*,⁴⁸¹ *Adya v. Mt. Chandavati*,⁴⁸² *Rani Meera v. Ram*.

(469) 46 I.A. 285, 43 M. 244.

(470) 49 A. 713 1928 A. 45

(471) 7 Pat. 163 1928 P. 220

(472) 1 Luck. 10 92 I.C. 126 1926 Oudh 211

(473) 5 Lah. 192 51 I.A. 171

(474) 7 Luck. 320 1933 Oudh 97

(475) 52 A. 222.

(476) 1946 Nag. 277.

(477) 1968 Punj. 295.

(478) 43 M.L.W. 464 1936 P.C. 103; 63 I.A. 155, 40 C.W.N. 482; 38 Bom. L.R. 462, 1936 A.L.J. 686; 1936 M.W.N. 499 17 P.L.T. 321.

(479) 31 A. 497 96 I.A. 138; 6 A.L.J. 807; 11 Bom. L.R. 911; 13 C.W.N. 117; 19 M.L.J. 687. * L.C. 795 (P.C.).

(480) 31 M. 179.

(481) 6 M.L.A. 1.

(482) 1934 Oudh 265; 10 Luck. 35.

Hulas,⁴⁸³ *Sondamini v. Administrator-General, Bengal*,⁴⁸⁴ *Khunni Lal v. Gobind*,⁴⁸⁵ *Appaswami v. Thavammal*,⁴⁸⁶ *Akkamma v. Pichamma*.⁴⁸⁷ This test, however, is applicable only where the language of the deed of compromise under which she obtains the property is not clear as to the quantum of the interest given to her in the property, and hence, if on that language it is clear that what is given to her is an absolute estate then she is so entitled to it (*Kothu v. Bahu*,⁴⁸⁸ *Lakshamma v. Venkataswami*,⁴⁸⁹, a case of family arrangement with illatom son-in-law). But in such a case the effectiveness of the arrangement to confer an absolute estate depends upon the competency of the other party to the settlement to confer such an estate (*Sethuramamma v. Pattabai*,⁴⁹⁰ *Mooka v. Valasanda*,⁴⁹¹). Where a daughter who is not an heir owing to her exclusion by custom gets property under a compromise with the reversioner who is entitled to such property, the property so obtained by her was held to be her Stridhanam to which her daughters would be entitled to inherit to the exclusion of her sons (*Rajeshwar v. Har Kishan*,⁴⁹²). The earnings of a woman, married or unmarried, from prostitution constituted her Stridhanam (*Hindal v. Tripura*,⁴⁹³ *Jugannath v. Narayan*,⁴⁹⁴ *Mandaram v. Mandaram*,⁴⁹⁵).

The above would be the state of the law prior to the enactment of Section 14 of the Hindu Succession Act, 1956. Under this section, however, any property acquired by her, whatever be the nature of the acquisition and whenever it might have been acquired, shall be held by her as full owner. Property attracting Section 14 (1) includes under the *Explanation* thereto property acquired by a female Hindu by inheritance etc., or in any other manner whatsoever. The word 'whatsoever' indicates the wide amplitude. It would include property acquired under an award or a decree.⁴⁹⁶ If a person puts a female Hindu in possession of property without executing a deed of transfer as envisaged in the Transfer of Property Act, the acquisition by the female Hindu in such a case is not unlawful and will be covered by the *Explanation* to Section 14 (1). Similar will be the position in a case where a female Hindu acquires property by exchange although exchange had not been included in the *Explanation*.⁴⁹⁷ The term 'in any other manner whatsoever' must be interpreted *eiusdem generis* with the other terms which confer a right of ownership albeit of a limited character. It cannot be extended to cover a trespasser.⁴⁹⁸ Nor can the phrase be made

⁴⁸³ 1 I.A. 157.

⁴⁸⁴ 20 C. 433, 20 I.A. 12 (H.C.).

⁴⁸⁵ 33 A. 356, 38 I.A. 87, 3 A.L.J. 552, 13 Bom. L.R. 427, 15 C.W.N. 545 (1911) 1 M.W.N. 432, 21 M.L.J. 645, 10 I.C. 477.

⁴⁸⁶ 6 O.L.W. 169 (1939), 2 M.L.J. 236, 1939 M.W.N. 632, 1939 M. 890.

⁴⁸⁷ 24 L.W. 476.

⁴⁸⁸ 63 I.A. 15, 1 Ind. P.C. 103, 40 C.W.N. 481, 38 Bom. L.R. 462, 43 L.W. 664, 1936 A.L.J. 686.

⁴⁸⁹ 56 L.W. 428 (1943), 2 M.L.J. 173, 1943 M. 731.

⁴⁹⁰ 1940 M.W.N. 14, 1940 M. 739.

⁴⁹¹ 59 O. Journal S.R.C. 74.

⁴⁹² 1933 Oudh. 170.

⁴⁹³ 40 C. 630, 19 I.C. 124, 17 C.W.N. 79 (F.B.).

⁴⁹⁴ 17 I.C. 439, 12 Bom. L.R. 713.

⁴⁹⁵ 24 M.L.J. 233, 18 I.C. 601.

⁴⁹⁶ *B.B. Patti v. Ganga Bai*, 1972 Bom. 166.

⁴⁹⁷ *Shreeji Jivraj v. Premo Kurr*, 1964 Pat. 187.

⁴⁹⁸ *Andal Ammal v. Sivaprakasam*, I.I.R. (1963) Mad. 360; 1963 Mad. 452.

elastic so as to render nugatory Section 14 (2). Each case has to be decided on its own merits.⁴⁹⁹

16. Presumption regarding property in women's possession.—There is no presumption that property standing in the name of a female member of the family is the common property of the family and not her Stridhana, and even if it is in the possession of a widow no presumption arises that it was a part of her deceased husband's estate. (*Diwan Ram Bijai v. Indarpal*,⁵⁰⁰ *Narayana v. Krishna*,⁵⁰¹ *Baikunthnath v. Jai Kissen*,⁵⁰² *Sadayappa v. Ragha*,⁵⁰³) On the other hand the presumption seems to be the other way. The provisions of Section 110 of the Evidence Act raise a presumption that a "woman" who must be included in the word "person" in the section has absolute title in respect of the property in her possession unless and until the contrary is established, and, until this presumption is rebutted by proper evidence which the Court accepts, her powers of disposal in respect of that property remain unfettered (*Raj Bahan Singh v. Shri Shankurjee*,⁵⁰⁴ *Baikunthnath v. Jai Kissen*,⁵⁰⁵ *Narayana v. Krishna*,⁵⁰⁶ *Diwan Ram Bijai v. Indarpal*,⁵⁰⁷ *Ganpat Secretary of State*⁵⁰⁸).

17. Restricted estate under instrument of gift, etc.—Sub-section (2) states that "nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will, or other instrument or the decree, order or award prescribe a restricted estate in such property." The sub-section would apply only in cases where possession is acquired for the first time by the female Hindu and not in assertion of an acceptance of a pre-existing right in her. The actual test is to find whether under a given instrument the title is created in favour of the female for the first time or the entitlement in her is merely a restoration of the right she already possessed under the Hindu Law.⁵⁰⁹ As already said three things are necessary before this sub-section can apply (1) there must be an instrument or document, (2) that instrument or document must be the source or the foundation of the right of the Hindu female to the property in question, and (3) that document or instrument must contain terms which restrict the estate taken by the Hindu female.⁵¹⁰ If any one of these is absent the estate taken by the woman in the property shall

(499) *Venugopal v. Thayyanayaki*, (1979) 1 M.L.J. 87 1979 Mad 124

(500) 26 C. 871. 26 IA 226 4 C.W.N. 1 2 Bom. L.R. 1 (P.C.).

(501) 8 M. 214

(502) 51 A 341 19/9 A. 449.

(503) 27 M.L.T. 325 62 I.C. 220

(504) 4 O.W.N. 1179 1927 O. 618.

(505) 51 All. 341 1929 A. 449

(506) 8 M. 214

(507) 26 Cal 871 4 C.W.N. 1. 26 IA 226 (P.C.).

(508) 45 B. 1106 223 Bom. L.R. 462; 1921 B. 138

(509) See *Venugopal v. Thayyanayaki*, (1979) 1 M.L.J. 87; 1979 Mad. 124; *Thulasamma v. Sessa Reddy* (1978) 1 S.C.J. 29; 1977 S.C. 1944

(510) *Thayyanamma's case* supra at p. 1968.

be absolute.⁵¹¹ Where the instruments referred to are not the source of the interest created but are merely declaratory or definition of the right antecedently enjoyed by the Hindu female, Section 14 (2) has no application and it matters not if it is specifically provided in such instruments in express terms that the Hindu female has a limited estate or cannot alienate. Such terms are only reiteration of the incidents applicable to limited estate in Hindu Law.⁵¹² The Full Bench decision in *Jaswant Kaur v Harpal Singh*,⁵¹³ that where a widow was given certain properties under her husband's will for her maintenance, creating a life interest with no power to alienate, Section 14 (2) applied on the ground that she had no pre-existing interest in her husband's property may not be sound in view of the description of the widow's right to maintenance in *Thulasamma's case*,⁵¹⁴ as flowing from the social and temporal relationship between the spouses by virtue of which the wife becomes a sort of co-owner in the property of her husband though of a subordinate kind as being an equitable charge on his property and as a pre-existing right in his property under the Hindu Law. The suggestion that it is only when the instrument puts restrictions over and above that which go with the limited interest that section 14 (2) will apply,⁵¹⁵ is not warranted both on the language of the sub-section and the decision of the Supreme Court in *Mst Karmi v Amru*,⁵¹⁶ holding that where life-estate is given to the wife under husband's will and thereafter to collaterals, Section 14 (2) applies and the wife's estate is not enlarged.⁵¹⁷ Property given to a woman under an arrangement which is not in writing though the arrangement restricted the enjoyment of the property by that woman will be taken by her as absolute owner. Besides, if even *de hors* the instrument the woman has an independent right to the property by way of inheritance, prescription or otherwise, she takes the property absolutely despite the instrument in her favour restricting her right in the property. So also, the existence of an instrument does not prevent the woman taking absolutely under it. It is only if that instrument contains terms prescribing a restricted estate in the property that this sub-section will be attracted. It is necessary to observe in this connection that the terms restricting her enjoyment should not be repugnant to the estate created by the document in question. Whether the instrument creates an absolute estate in the woman, making the terms therein restrictive of that estate void as repugnant to it or whether the instrument itself creates only a restricted estate, are questions which have to be answered on a conspectus of the entire document with a view to ascertain the real intention of the parties concerned. In the ascertainment of this intention the words used are primarily considered. The principles applicable to construction of Wills are also applicable to the construction of Instruments under which the woman gets an estate. In sections 401 and 402, the principles applicable to the constructions of Wills and Gifts are discussed.

(511) See *Jaswant Kaur v Harpal Singh*, 1977 P & H 341 (F.B.).

(512) *B.B. Patel v. Gangabai*, 1972 Bom 16, approved in *Thulasamma v. Satha Kandy*, 1977 S.C. 1944; see also *Ram Sarup v. Joti*, 74 Punj. L.R. 971.

(513) *Jaswant Kaur's case*, *supra*.

(514) 1977 S.C. 1500, 1960.

(515) *Krishna Subbamma v. Chennakha*, (1970) 2 A.P.L.J. 165.

(516) 1971 S.C. 745.

(517) See *Dehale Rao v. Umrao of India*, 1977 A.P. 237; (1977) 2 An. W.R. 963.

18 Sale by a Hindu female—Sub-section (1) of Section 14 is designed only to benefit the widow in respect of property of which she is in possession at the time or after the Hindu Succession Act came into force. If, before that time, she had parted with possession of the property under a sale executed by her, no benefit to her favour can be postulated. No doubt, if she is in possession of the property at the time this Act came into operation and subsequently sells it, such sale passes to the purchaser an absolute interest in the property⁵¹⁸ even though there is no benefit or necessity to support the alienation because at the time she sells the property she is an absolute owner of the same and can deal with it in any way she likes, irrespective of any question of a binding purpose. But this is not the position if the sale had taken place prior to the Act. Two things are wanting in the case of such a sale for attracting the operation of sub-section (1) of Section 14 which converts a qualified estate into a full estate and these are: (1) her being in possession of the property when the Act came into force, and (2) there being a benefit to her by the sub-section being made to apply to such a sale.

So far as the property so alienated is concerned the right of the reversioners to bring a suit to challenge the alienation and obtain a declaration in protection of their rights is in no way affected *Bapurao v. Nerya*:⁵¹⁹

A question may arise when a Hindu female having a qualified estate in the property in her possession, sold the property before the Act but had not parted with possession when the Act came into force and there is no necessity or benefit to support the alienation, is the purchaser entitled to recover the property from the woman and take it absolutely as against the claim of the reversioners on the grounds of want of benefit or necessity for the alienation? The answer is in the affirmative on the wording of the section which is satisfied by the facts of the illustration. In such a case, the woman was in possession of the property when the Act came into force and she would be entitled to hold the property as full owner, and she having parted with that property the purchaser is entitled to take the property as he would take if he were to purchase from a male owner of the property who has absolute interest therein. But if she had also parted with possession with the sale and was out of possession and the purchaser was in possession when the Act came into force, the purchaser cannot insist upon the section coming to his help. He cannot contend that the principle of Section 43 of the Transfer of Property Act would apply to his case and enable him to found himself on the principle of feeding the estoppel embodied in that section. The reason is that section would apply only when a person not authorised to sell a particular property gets an interest in that property which enables her to sell. But the latter ingredient cannot be postulated in a case where when the Hindu Succession Act came into force she was not in possession. It is being in possession at that time that gives her an absolute estate. If she had already parted with possession of the entire interest in the property by and under the sale executed by her prior to the Act, there is no accrual of additional or fresh interest on which the principle of Section 43 of the Transfer of Property Act can operate. (See *Kotruswami v. Venkaya*,⁵²⁰ *Mathani Musir v. Mst. Ratna Kuer*,⁵²¹ which holds that the reversioner is entitled to recover the property, *Amar Singh v. Swaram*.⁵²²) Where however the widow makes a gift of the property to another prior to

(518) *Hari Ram v. Harbans Singh*, (1975) 3 S.L.J. 88

(519) 1961 Bom. 300; *Bhagerathi v. Nanibela*, 79 Cal. W.N. 387.

(520) 1959 S.C.J. 437; (1959) 1 M.L.J. (S.C.) 158.

(521) 1963 Pat. 337.

(522) 1960 Punj. 530; I.L.R. (1960) 2 Punj. 348 (F.R.).

the Act and the donee gifts back the same property to the widow after the Act, what is said above cannot be pressed into service for the purpose of making the widow the absolute owner of the property *Ganesh Mehanra v Sukria*.⁵²³

There is, however, one aspect which falls to be considered in this connection in favour of the purchaser from a limited owner. It prior to this enactment a Hindu woman sold the property representing that she was absolutely entitled to it and it turned out that she had only a qualified interest, the purchaser, on the coming into force of this Act, can call upon the woman to make good her representation or pay him damages for the loss that he may sustain by the reversioners proceeding to recover the property from him. In such a case it is possible for the widow to purchase back the property, obtain possession and again resell it to the original purchaser, in which case the latter will take the property absolutely without any fear of a claim from the reversioners later.⁵²⁴ This device though circuitous and costly involving as it does the additional conveyances with the concomitant of fresh stamps and registration charges, is still a device open in law. There is nothing illegal in such a transaction designed only to set right a wrong done to the stranger-purchaser and at the same time the requirement of this section with reference to the woman being in possession of the property, is also satisfied.

In *Chinnakolanda Goundan v Thanji Goundan*⁵²⁵, it was held that if a widow who had inherited her husband's property for a limited estate had gifted or sold the property for no binding purpose prior to the Hindu Succession Act but gets a reconveyance of that property subsequent to the Act she becomes absolutely entitled to that property and can pass a good title to any subsequent transferee from her whether the transferee is the original transferee or some other person, despite a declaratory decree obtained by the reversioners prior to the Act that her gift or alienation previously sued was not binding on the reversioner (See also by *Teja Singh v Jagat Singh*.⁵²⁶

Where a suit by reversioners to get patta of occupancy rights granted by a widow declared null and void was decreed before the coming into force of the Act, the decree survived even after the enlargement of her estate and the alienee cannot take benefit of the enlargement.⁵²⁷ The transferee of an undivided interest is distinct from that of a female who is not a coparcener and in a suit by the non-alienating coparceners for dispossession of the transferee of the interest of the widow, the proper course will be to pass a decree for joint possession leaving the parties to seek partition.⁵²⁸

In *Pathumma Beebi v Krishnan*⁵²⁹, it was held that a woman who sells her limited right for the duration of her life in the property could not be said to have been in possession of the property subsequent to the date of the sale.

(523) 1953 Orissa 167

(524) See *Bhagwan v. Vishwanath*, 1979 Bom. 1

(525) 1965 Mad. 497

(526) 1964 Punj 4. See further *Bhagwan v Vishwanath*, supra, *Bai Champa v Chandrakanta* 1973 Guj 227, *Jagat Singh v Teja Singh*, 1970 P & H 309 (FB). See however *Venkataram v Palamma*, (1970) 2 And W R 264

(527) *Badri Lal v Jas Kishan*, 1972 S L J 301

(528) *Sri Krishna v Phool Kumari*, 1973 All 439

(529) 1961 Ker 247

Where properties inherited by a widow were alienated by her by way of oral gift prior to the Act but the transaction being invalid as opposed to section 123, Transfer of Property Act, the properties must be regarded as being still held by the widow so as to attract section 14 (1), she being in a position to recover the same from the donee.⁵³⁰ Where a widow executed a settlement deed of property in her capacity as legatee under her husband's will, while she was only an heir to her son with a limited estate, the settlement passes no interest to the donee, her right as heir subsists and being capable of obtaining actual possession section 14 (1) will enlarge her estate.⁵³¹

19 Mortgage by a Hindu female—The considerations which apply to the case of a sale by a Hindu female prior to the Act cannot apply to the case of a mortgage by a Hindu female before the Act came into force. If the mortgage is a simple one the female holder being in possession of the property at the time this Act came into force, section 14 would apply to enlarge the limited interest of hers into full ownership and the fact that the death of the lady took place after this Act will not entitle the reversioners to ignore the mortgage and take possession of the property on the ground that there was no necessity or benefit of the estate to support the mortgage. The question whether, if the mortgage was a usufructuary one with possession transferred to the mortgagee, this section will apply to enlarge the interest of the mortgagor into an absolute estate in the property so as to prevent the reversioners from claiming the property without being bound by the encumbrance, is more difficult and falls to be answered by considering the proper meaning to be given to the word 'possessed' in sub-section (1) of this section. Can it be said that the woman is still in possession of the property when she has usufructuarily mortgaged the property before the Act? The word 'possession', as already discussed, means such possession as the property is capable of. In the case of a usufructuary mortgage, no doubt, the corporeal possession of the property is transferred to the mortgagee but the woman-mortgagor is still entitled to the equity of redemption which is certainly property and that property admits of only what may be called constructive possession in the sense of a right to possession on redemption. So even in the case of a usufructuary mortgage as in the case of a lease by the woman, the possession must be considered to be with her even though the physical or actual or corporeal possession is with the mortgagee. The section therefore applies to enlarge the woman's interest in the equity of redemption to that of an absolute estate subject to the rights of the mortgagee to be in enjoyment of the property till the mortgage debt is wiped off. The reversioners of the woman are not, therefore, entitled to contend that in the case of a usufructuary mortgage by the woman prior to the Act which mortgage continued at the time and after the Act was passed, they are entitled to get back the property on the woman's death on the ground the mortgage is invalid for want of necessity or benefit of the estate in support thereof. *Jai Ram v. Tota Rma* ⁵³².

In *Kanhimathinatha Pillai v. Vayapuri Mudali*,⁵³³ it was however, held following *Kotturamam v. Veeravaa*,⁵³⁴ that a usufructuary mortgage executed by the widow prior to the Act without any necessity or benefit of the estate became extinguished when she died after the Act

(530) *Bas Champa v. Chandrakanta*, 1937 Guj. 227.

(531) *Venkata Subbasaiah v. Rangasah*, (1972) 2 An. W.R. 276; 1972 A.P. 246.

(532) 1961 Punj. 395.

(533) 1963 Mad. 37.

(534) 1959 S.C.J. 437.

and the reversioners to the estate were entitled to recover possession of the property without paying the mortgage amount. The reason for this conclusion is that it is not the intention of the Act to benefit pre-Act alienees who took the alienation without any justifying necessity. But it is not easy to agree with the decision since even in the case of a usufructuary mortgage, she cannot be held not to be in constructive possession.

20. Lease by a Hindu female—The principles mentioned as applicable to the case of a mortgage by a Hindu female having a limited estate, which mortgage had been executed prior to the Act, are *a fortiori* applicable in the case of a lease by a Hindu female under which she puts a third party in possession of the property. It cannot be said that simply because the physical possession is with the lessee, the woman has no possession of the property. Most properties are and can be enjoyed only by receipt of rent, for cultivation or occupation by others. The possession in such cases means only the right to possess established by the fact or the receipt of rent. The difference between a case of a sale by a limited female owner and the case of a mortgage or a lease by her is this. That in the case of a sale there is absolutely no present or future interest in the woman which enables her to get possession of the property but in the case of the mortgage or lease there is an indication of possession in the consideration received by her with a right in her to obtain future physical possession. If the expression 'possessed' is to be as it appears ought to be, interpreted as meaning a right to possess, it is easy to solve all problems arising under sub-section (1) with reference to the enlargement of the qualified estate of a female to full ownership (See *Kothruswami v. Veerappa*)¹⁵⁰.

The position is not altered by the fact that the lease by the widow is of a permanent nature though for a notional rent. *Thakur Ram Janki v. Jago Singh*¹⁵¹

21 Woman's right to possession.—Cases may arise of properties inherited by a woman being in the possession of trespassers. If she gets possession at any time after the Act, the requirement of sub-section (1) is satisfied and her right becomes enlarged.

Supposing the woman was not able to recover possession and sold the property to a stranger before the Act, can the purchaser file a suit to recover the property from the trespasser and get an absolute title free from any claims from reversioners on the ground of want of benefit or necessity of the estate? The legal position will be the same as in the case of a sale by the limited female owner of the property in her possession. If the sale was before the Act and was not justified by the benefit or necessity of the estate, the woman cannot pretend that she had any kind of interest in the property when the Act came into force and sub-section (1) of section 14 can therefore have no operation. If a purchaser from the woman recovers the property from the trespasser he will be in no better position than if he had purchased a property in the possession of a woman, and after the death of the woman the reversioners are entitled to recover it from the purchaser. If she had sold the property after the Act, her only right in the property in the hands of the trespasser, is the right to file a suit and if the woman had herself recovered the property from the trespasser she would have taken an absolute interest in that property and so also the purchaser claiming, under her would take the same right. The transfer by the woman of the property with the right to recover the same from the trespasser is not a transfer of a mere right to sue within the meaning of section 6 (e) of the Transfer of Property Act (*Jewan Ram v. Ratanchand Kashinchand* ¹⁵², *Deorao Gopalji*,

(555) 1959 S.C.J. 437.

(556) 1962 Pat. 131.

(557) 1921 Cal. 795.

v *Sadashe⁵³⁸*, *Parma Sah v United Provinces⁵³⁹*, *Vithal v Jagannath⁵⁴⁰*, it cannot be denied that the transfer as such is valid. But, what does it pass? The better opinion seems to be that as the intention of the Legislature in this section is to confer upon the woman having a limited estate in all properties of which she is or is entitled to be in possession, it is merely a stretching of the principle of a female holder being a mortgagor under a possessory mortgage or a lessor in the case of the owner whose property is trespassed upon by another. In all these cases, the right to possession is there and it is nothing but the implementation of the intention of the Legislature to accord to the expression 'possessed' the meaning of 'right to possess.' See the discussion in *Kotturumami v. Veerava⁵⁴¹*.

Whatever be the answer to the problem posed in the above case, there can be no doubt that when the woman herself recovers the property from the trespasser after the Act or allows the property to be trespassed upon after the Act, a purchaser from her of that property is entitled to recover the same from the trespasser and hold it as absolute owner in the full right of the woman without any liability to be questioned by the reversioners subsequently on the ground of want of legal necessity for the transaction.

22 Declaratory decree regarding invalidity of alienation—Under the Hindu Law as it obtained prior to the Hindu Succession Act an alienation by a limited female owner could be arraigned as not binding upon the reversioners on the ground of absence of legal necessity to support the alienation and the reversioners were entitled to bring a suit for declaration of the invalidity and non-binding nature of such alienation. If in such a suit a decree had been given declaring the alienation not to be binding upon the reversioners, the question may arise whether after this Act that declaration would be operative so as to enable the reversioners to recover the property on the death of the limited owner subsequent to the coming into force of this enactment. If the alienation was a sale then the declaratory decree by the Court about the invalidity of the sale would continue to enure for the benefit of the reversioners even after the Act had come into force and the fact that the female limited owner was alive after the Act was passed would not alter the situation and lend validity to the sale. But if the alienation by the limited female owner was one by way of mortgage or long lease, the decree obtained by the reversioners prior to the Act declaring the non-binding nature of the mortgage or lease would cease to be operative if the limited female owner is alive after the Act. The point of distinction is that in the case of a sale, the female vendor could not be said to be possessed of the property after the Act came into force. But in the case of a mortgage or lease she cannot be held to be not possessed of the property so as to prevent the operation of sub-section (1) of this section. The principles applicable to cases of sale or mortgage by a limited female holder which had been already discussed are applicable to a case even where there is a declaration by Court of the invalidity of the alienation. (For a case of gift, see *Daval v. Buja⁵⁴²*.) In *Chhagunram v. Nagulal⁵⁴³*, a widow succeed

(538) (1906) 2 Nag. L.R. 17.

(539) 1939 Oudh. 196

(540) 1942 Nag. L.J. 30.

(541) 1959 S.C.J. 437. See also *Badri Prasad v. Smt. Kanse Dose*, (1970) 2 S.C.J. 114; 1970 S.C. 1963 [“possessed” means the state of owning or having in one's hand or power.]

(542) 1959 Punj. 326.

(543) I.L.R. (1966) Guj. 900.

ing to her husband's estate made a gift of the property to a minor relation herself acting as the donee's guardian and continued in possession of the property until after the present Act came into force and sold the property after the Act and the question was whether the declaration of the invalidity of the gift which the reversioners obtained prior to the Act would invalidate the sale by the widow and it was held that since the widow had title to the property as well as possession after the Act came into force the sale was valid.

23. A female holder selling prior to the Act but continuing in possession after the Act—A case may arise where a limited female holder enters into a transaction of sale of the property prior to the Act but before the property was delivered to the purchaser this Act had come into force. Such delay might have been caused by any of many conceivable reasons. The limited female holder after executing a sale deed might have gone back upon the sale and refused to deliver possession and this might have necessitated the purchaser enforcing his right by a suit for recovery of possession under the sale and to get a decree and obtain possession after the Act. He is then entitled to take the property absolutely free of any claim from the reversioners on the ground of want of necessity for the alienation. Or the limited female holder might not have been in a position to deliver possession to the purchaser of the property sold immediately after the sale on account of some dispute with reference thereto between herself and others and this might have occasioned a delay in the purchaser obtaining possession and such possession might have been delivered in fact only after the Act. In such a case also, the purchaser would take the property free of the claims of the reversioners. The point of difference between the case of a sale by a limited female holder taking place prior to the Act followed by delivery of possession after the Act and the case of an absolute sale in favour of the purchaser accompanied by delivery of possession prior to the Act is that in the former case the limited female holder is possessed of the property when the Act came into force while in the latter case he had no such possession when the Act came into force. This distinction makes all the difference in the application of section 14 (1) to these respective cases.

Despite the mere fact that a limited female holder executed a deed of gift prior to this Act but had not given effect to that deed but continued to be in possession of the property even after the Act, her right to the estate would be enlarged into an absolute one by reason of section 14 since she was in possession of the property on the date of the Act despite her having executed an ineffective deed of gift. *Viswapati v Venkatakrishnan*.⁵⁴⁴

24. Agreement to sell by a female limited holder—Instead of an outright sale to a stranger there might merely be an agreement to sell the property held by her as a limited owner and such agreement might not have been implemented by a sale subsequently by the voluntary act of the limited female holder. The purchaser in such a case would be put to the necessity of suing for specific performance of the contract to sell and if he obtains a decree for such specific performance and obtains possession of the property in pursuance of such decree, a question may arise as to the binding nature of such decree against the reversioners. The answer must depend upon whether this possession in pursuance of the decree for specific performance of the contract to sell was obtained before the Act or after the Act. If possession had been taken by the purchaser prior to the Act, then the only right which passed to him would be the qualified right of the limited female holder and if there was no legal necessity to justify the sale

(544) (1962) 2 An. W.R. 119. Cf. *Bai Ghanpa v. Chandrakanta*, 1973 Guj. 227 [oral gift by widow being invalid she must be deemed to have been in possession at the commencement of the Act and her estate would be consequently enlarged.]

the reversioners would be entitled to recover the property from the purchaser even though the limited female holder was alive after the Act. If on the other hand the possession in pursuance of the decree for specific performance was obtained after the Act came into force, the purchaser's right becomes unavailable by the reversioners even though the agreement to sell was not upheld by necessity or benefit of the estate.

25 Death of the alienating female prior to the Act.—If a Hindu female having a limited estate died prior to the Act after making an alienation of the property, the alienee cannot claim that he gets the benefit of the absolute ownership conferred upon a female under the 1st sub-section of section 14. The section, as already considered, requires the Hindu female to be possessed of the property at the time the Act came into force or subsequently and this cannot be if the female had died prior to the Act. The validity of such alienations and their being binding or otherwise upon the reversioners should be determined upon well-known principles obtaining prior to the Act. If the alienation was justified by necessity or benefit of the estate it would be upheld be it a sale, or a mortgage, or any other alienation for consideration. If, on the other hand it is not justified by such necessity or benefit, the reversioners are entitled to recover possession of the property on the death of the limited female holder.

26 Joint female holders and alienations.—Cases may arise where an alienation might have been made by joint female holders, for instance, co-widows or co-daughters who, prior to the Act, had inherited the estate in which they held only a restricted estate. If both of them had died prior to the Act, the validity of the alienation falls to be determined on the tests applicable to an alienation by a sole female limited holder. If one of them alone had died prior to the Act but the other was alive after the Act, the question whether the alienation should be upheld or not as against the reversioners has to be decided on the same principles as are applicable to an alienation by a sole female holder. The estate being a joint one there is survivorship between the joint female holders and the survivor of them represents the estate fully. If it is a sale and the possession had passed prior to the Act, then it is not immune from attack by the reversioners on the ground of want of necessity. If it is a mortgage, whether with or without possession, since the surviving limited female holder would be considered to be in possession of the right of redemption in property even after the Act, the mortgage, cannot be impeached by the reversioners because the mortgagee is entitled to insist upon being treated as one taking a mortgage from an absolute owner. The same considerations will apply if both the joint female holders are alive after the Act.

It has been held in a Madras case⁴⁴⁵ that on the coming into force of the Hindu Succession Act, the joint tenancy of co-widows who had succeeded to the properties of their deceased husband is converted into a tenancy-in-common in equal shares they having been in possession on that date.

27 Construction of instruments, decrees, awards etc.—When a Hindu female acquires property under an instrument or decree or award or any other document and it cannot be held that apart from such instrument, decree, award or document she had a pre-existing or independent right in that property under the general law as a qualified owner coming within the scope of sub-section (1) of this section which enlarges that qualified ownership into full ownership in the female, the question of the nature of her estate in the property, whether it is a qualified one or an absolute one, is answered by the examination of all the terms thereof.

(545) *Nagana Nalwar v. Ponuchinnayyan*, I L.R. (1969) 2 Mad. 507 (1970) 1 M.L.J. 437.

and construing them reasonably with reference to the possible intention underlying it. There is no presumption that what is given to a woman is only a limited estate. On the other hand the presumption is in favour of the estate being an absolute one, whether it is obtained by a male or a female. The old notions that whenever property was given to a woman she must be presumed to take only a limited estate have been washed away by the flood of decisions which categorically wiped out the distinction in this respect between the taker being a male and the taker being a female.

After the enactment of section 14 (1) one must start with the presumption that the property in the possession of a female Hindu however acquired is held by her as full owner. Sub-section (2) is only in the nature of a proviso or exception to sub-section (1). It must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision, contained in sub-section (1). So read it must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right under a gift will, instrument decree, order or award the terms of which prescribe a restricted estate in the property.⁵⁴⁶ In such cases she must hold it on the terms on which it is given to her and if what is given to her is a restricted estate, it would not be enlarged by reason of sub-section (2).⁵⁴⁷ For instance, suppose a daughter was given a limited estate in the presence of the widow. The daughter not being an heir in the presence of the widow before the Hindu Succession Act came into force she had no right or share in the property and if she was allotted some property under any instrument, a new and fresh right was created in her favour for the first time which she never possessed. Such a case will be squarely covered by section 14 (2).⁵⁴⁸

The words "restricted estate" are wider than "limited interest" as indicated in sub-section (1) and they include not only limited interest but also any other kind of limitation that may be placed on the transferee. While a limited interest would indicate only a life estate, a restricted estate is much wider in its import.⁵⁴⁹

The modes of acquisition mentioned in section 14 (2) must be in writing and if it is oral the sub-section cannot be invoked.⁵⁵⁰

The use of the words "to enjoy the property for life only without any powers of alienation" is not decisive as to a case falling within sub-section (2). The background of the transaction, the pre-existing relationship of the parties, if any, as distinguished from the parties being absolute strangers and whether they have claim upon the property in *praesenti* or in a contingency, are all aspects which should be taken into account in determining whether a particular stipulation in a deed comes under section 14 (2) or it is merely expressing the legal incident of the right created. The Court must take an overall picture and determine whether the predominant idea in the transaction is in the realm of Hindu Law and restraints are imposed on women in view of the prevalent notions existing then, or is the transaction predominantly in the realm of contracts.⁵⁵¹

(546) *Thulasamma v. Sesha Reddy*, (1978) 1 S.C.J. 29; 1977 S.C. 1944. See also *Rangaswami v. Chinammal*, 1964 Mad. 987, *Reddy Perish v. Kanna Devi*, 1970 S.C. 1163.

(547) *Thulasamma's case* supra, at p. 1950.

(548) *Ibid*, p. 1974.

(549) *Ibid*, pp. 1978, 1968.

(550) *Chellammal v. Nallammal*, (1971) 1 M.L.J. 439; *Venabhadr Rao v. Lakshmi Devi*, 1965 A.P. 367; but see *Bindu v. Dymichand*, 1963 Puri. 34.

(551) *Chellammal's case*, supra (approved in *Thulasamma's case*, 1977 S.C. 1944.)

To attract sub-section (2), it is not enough for the decree to prescribe the restricted estate, it is further necessary that the female Hindu should acquire the property under the very decree.⁵⁵³

The decree contemplated by Section 14 (2) by which the acquisition is made should be a decree which has become final and which is not the subject-matter of the appeal in which the question is raised (*Pothamma Bebi v Krishnan*,⁵⁵⁴ *Rambai, Devi v. Smt. Chandobibi*⁵⁵⁵).

In view of the *Explanation* to sub-section (1) of Section 14, the widest possible connotation should be rendered to the expression 'acquired' used therein. But such meaning is not to be imported to the word 'acquired' used in sub-section (2) and the said word should be given a restricted meaning in the ordinary sense of that expression, namely, as signifying that the acquisition must be one under the instrument or by the method mentioned and that prior to such acquisition, the person acquiring it had no interest in the property. *Sandhar Chandra Day v. Terasundari*.⁵⁵⁶

The decree or order of a civil Court does not mean decree or order made by a Court constituted under the Civil Courts Act and would include an order made by a Deputy Commissioner or other Revenue authority acting as a civil Court under any particular statutory provision. *Arakhtis Das v. Hari Mohapatra*.⁵⁵⁷

In *Harnam Kaur v. Sher Singh*,⁵⁵⁸ it was held that a decree obtained by a reversioner declaring that a will executed by the widow prior to the Act was invalid and would not bind the reversion would not prevent her acquiring full right in the property inherited by her from her husband (and it was the subject-matter of the said decree) and to such a case section 14 (2) cannot have any application.

In *Gobardhan Makton v. Hari Ram*,⁵⁵⁹ a widow and her daughter sold the property inherited by the widow from her husband and this sale was in 1947 and the daughter's son filed a suit for declaration of the invalidity of the same on the ground of want of legal necessity and since the widow died pending the suit in 1960 the question was whether the suit was maintainable by the daughter's son since the daughter had survived her mother and would take the property as the heir of the mother absolutely under the Hindu Succession Act. It was held that the suit was not maintainable since the daughter would be estopped by the recital as to legal necessity in the sale-deed and that the suit should be dismissed.

If a Hindu widow who had inherited her husband's property prior to the coming into force of this enactment had to file a suit against reversioners or the reversioners had to file a suit against her in respect of the property inherited by her, and in that litigation which was prior to the Act a compromise decree had been passed by and under which the widow was

(552) *Bhagwan v. Vishwanath*, 1979 Bom 1.

(553) 1961 Ker. 247.

(554) 1966 All. 584.

(555) 1962 Cal. 438.

(556) 1963 Orissa 162.

(557) 1963 Pwaj. 402.

(558) 1963 Pat. 335.

given only a life interest in the estate with a condition that on her death the estate should be taken by the reversioners, and the woman continued to be in possession of the property after the Act, it must be held that the property in her possession becomes her absolute property under the provisions of Section 14 (1) in spite of the conditions in the compromise decree which prevented her from alienating the same. The reason is that to such a case the provisions of sub-section (2) of Section 14 cannot be applied, for that sub-section must be construed as enacting to provide only for a case where the woman gets property by and under the deed or decree, and not by reason of an antecedent title which had only been recognised by the compromise decree. *Chinnappa v. Subbamma*,⁵⁵⁹ *Uday Shankar v. Tarabai*,⁵⁶⁰ *Purnachandya Bank v. Nimal Charan Bai*,⁵⁶¹ *Smt. Subhag Wanti v. Smt. Sodhan*,⁵⁶² *Birbal v. Gurdas*,⁵⁶³ In *Kamaleshwarapur v. Godabas*,⁵⁶⁴ the ruling was since Section 14 (2) contemplates fresh acquisition of right in the property it can have no application in the case of a partition deed under which a widow is given property with a restricted estate and therefore the property given to her under an instrument of partition in respect of which she has been expressly prohibited from alienating is taken by her absolutely under Section 14 (1).

Under Section 18 of Hindu Succession Act full-blood sisters exclude half blood brothers (*Sarwan Singh v. Smt. Bhat Kaur*,⁵⁶⁵ *Saraswathi Ammal v. Krishna Iyer*,⁵⁶⁶). Partition attracts Class (1), *Venabadi Rao v. Lakshmidasi*,⁵⁶⁷ a deed of family arrangement under which a grandmother gets property with restricted enjoyment attracts Class (2) when she had no right to the property prior to the arrangement, *Raghunath Sahuv. Bhimsen Naik*,⁵⁶⁸ (widow getting property with life-interest for maintenance under a decree becomes absolute owner of property after the Act; *Kali Ammal v. Andi Ammal*,⁵⁶⁹ In *Dharma Udayar v. Ramachandya Mudahar*,⁵⁷⁰ where in a partition between a father and his two sons and a widow of a predeceased son who died before the Hindu Women's Rights to Property Act came into force some properties had been allotted for life to the daughter-in-law, the deed of partition would fall under cl. 2 of Section 14 and the daughter-in-law cannot claim to have become an absolute owner of the property given to her under cl. (1) of this Section as she had not any right to property when her husband died and what she could claim then was only maintenance. In one case before the Calcutta High Court reported in *Lalchand v. Sushila Sundari*,⁵⁷¹ a suit was filed by the rever-

(559) (1968) 1 An. W.R. 65.

(560) I.L.R. (1967) Bom. 1282; 1968 Bom. 308.

(561) 1968 Orissa 196

(562) 1968 Punj. 24.

(563) (1968) 70 Punj. L.R. 292

(564) 1968 Bom. 25.

(565) (1968) 68 Punj. L.R. 609.

(566) I.L.R. (1964) 2 Ker. 209- 1965 Ker. 226.

(567) 1965 Andh. Pra. 367.

(568) 1965 Orissa 59.

(569) 78 L.W. 271; 1965 Mad. 451.

(570) 81 L.W. 399.

(571) 1962 Cal. 623.

sioners against the widow before the passing of the Hindu Succession Act. In that suit a consent decree was passed the terms of which embodied an undertaking by the widow not to alienate or encumber or otherwise deal with the estate so as to prejudicially affect the reversionary interest. After the Act, the widow filed a suit for a declaration that the decree had become inoperative by reason of the provision of Section 14 (1). It was held upholding her contention that there was no longer in existence a limited estate in respect of the property inherited by her nor any reversionary interest in respect thereof. Therefore the terms of the settlement which proceeded upon the footing of her being only a limited owner under the Hindu Law could no longer be operative and that the widow should be held to hold the property as an absolute owner. See also *Sampathkumar v. Lakshmi Ammal*⁵⁷².

Sub-section (2) being in the nature of an exception to sub-section (1) can apply only to properties acquired by way of gift or under will or under any other instrument. *Venkatasubba Reddy v. Panchalam*,⁵⁷³ *Setha Reddy v. Tulasamma*,⁵⁷⁴ *Shantabai v. Tarachand*⁵⁷⁵.

28 Position of co-heiresses like co-widows and co-daughters—When two co-widows jointly inherited the property of their husband prior to this Act they took the property with the right of survivorship between them but it was open to them to effect a partition as between themselves and enjoy the properties allotted to their shares separately. If there was no division prior to this Act as above but they continued to enjoy the property jointly even after the Act, they become absolute owners of the properties under the Act. Though there is no indication in the Act that the previous right of survivorship which existed as between them should continue or not even after the Act, it appears proper to predicate that in view of the enhancement of the qualified estate into an absolute one under this section, they continue to hold the property absolutely only as tenants-in-common without the right of survivorship. Each widow is entitled to alienate her interest in any way she likes both by will and *inter vivos* and on her death intestate her share will go to the heirs as determined in Sections 15 and 16⁵⁷⁶. It is *fortiori* if there had been a partition between the widows even before this Act and they continued to hold their divided shares after the Act and in such a case the property allotted to each widow is under her absolute disposition and control and subject to the rules of intestate and testamentary devolution under this Act. In *Ramasami Renu v. Nagammal*⁵⁷⁷, a Hindu died in 1931 leaving two widows A and B. These widows entered into an arrangement under which B said that she would possess and enjoy a particular property for her lifetime and that after B's death, A and her daughter should take it. B died after the Hindu Succession Act after settling that property in favour of C. It was held that since B was already the owner of the property in her own right as a widow and that as she did not acquire any right under the arrangement, Section 14 (2) could not apply, and as B was the absolute owner by virtue of Section 14 (1), the settlement to C was valid, as B was competent to dispose of it in favour of whomsoever she liked. See also *Sampathkumar v. Lakshmi Ammal*⁵⁷⁸.

(572) I.L.R. (1962) Mad. 832; 75 L.W. 639.

(573) 1962 Andh. Pra. 368.

(574) 1969 Andh Pra. 300.

(575) 1966 M.P. 8.

(576) *Nagema Nalder v. Panachanayyan*, I.L.R. (1969) 2 Mad. 507; (1970) 1 M.L.J. 437. See also *Binoth Mahant v. Bala Devi*, 30 Oct. L.T. 257; I.L.R. (1964) Oct. 146; *Natharam v. Rambai*, 1966 M.P.L.J. (Notes) 146.

(577) 1963 Mad. 133.

(578) (1962) 2 M.L.J. 464; I.L.R. (1962) Mad. 832; 75 L.W. 639.

It is possible for two co-widows prior to this Act as co-heiresses inheriting jointly their husband's property with the right of survivorship to enter into a partition by which each gives up her right of survivorship in the property allotted to the other. If in such a case one of them had died prior to the Act and her share was taken to be enjoyed by her heirs during the lifetime of the other and this state of affairs continued after the present Act, the position is not simple. No doubt, the surviving widow with reference to her share of which she continues in possession after the Act would take it absolutely under this section. The position of the heir of the other widow who continued in possession under this arrangement after the Act is derived from the deceased widow and since that widow was dead even before this Act, her heir if a woman, would come under this Section under the expression "in any other manner" appearing in *Explanation* to Section 14 (1) and the female heir of the widow will also be entitled therefore to hold the property absolutely under this Act. Where a widow has been allotted properties under a family arrangement deed expressly stipulating that she will not have more than a life interest therein, the case will come under Section 14 (2) and her interest will not be transformed into an absolute one; *Taria Devi v. Shyam Sundar* ⁵⁷⁹, Section 14 (2) cannot have any application to a case where a decree under which the widow is given a qualified interest in property happens to be the subject-matter of the appeal during the pendency of which the Act came into force. *Kari Venkamma v. Venkata Reddy* ⁵⁸⁰.

In *Nagarathnathachi v. Karpagathachi* ⁵⁸¹ it was held that where a partition between two co-widows had taken place prior to the Hindu Succession Act, 1956, and under that partition each of the two widows conveyed her rights in the properties allotted to the other widow, the latter widow had only the right to enjoy the property allotted to her absolutely but could not claim the properties allotted to the other widow, since she had given away her right of survivorship in respect of the properties allotted to the other.

A question may arise whether after the Act a Hindu widow who had succeeded prior to the Act to her husband's estate for a qualified interest could surrender it in the way she could do prior to the Act. In view of the provisions of Section 14, she becomes the absolute owner of the property of which she is in possession, and there cannot be in the old sense, a surrender so as to let in the succession to the estate by the heirs of the husband because the property becomes hers, and if she should surrender it must go only to her heirs. But, such surrender, though may be so-called is really a conveyance of her interest with the result that it cannot be orally conveyed as in the case of surrender under the Hindu Law but only by means of a document duly registered. *Nurtugolai v. Rambriksha Bope* ⁵⁸². But with reference to property which she had inherited for a limited estate prior to the Act but which she had alienated by way of sale also prior to the Act, the right of the reversioners to recover possession of the property is left intact if the alienation was not for the benefit or necessity of the estate, and if the widow makes a surrender with reference to such property, the old law would apply to validate the surrender even though it is not by written instrument or does not take the form of a regular registered conveyance. Where the question arises, when a widow makes a surrender after the Act and she is found to be in possession of some only of the properties which she had inherited prior to the Act, the rest of which having been alienated away by her for no binding purpose prior to the Act, the reversioner would be

(579) 63 Cal. W.N. 295.

(580) (1958) 2 An. W.R. 285.

(581) 1962 Mad. 482 (1962) 2 M.L.J. 312 75 L.W. 384.

(582) 1959 Pat. 446.

entitled to recover the properties alienated by her for no proper purpose, but as regards the properties held by her on the date of surrender, unless the surrender takes the form of a regular registered conveyance, the reversioners cannot claim any interest in them. This question arose before the Madras High Court in *Azhagammal v. Ayatakannammal*⁵⁸³, and was answered to the above effect.

A further question may arise whether the reversioners entitled to succeed in recovering the properties improperly alienated by the widow prior to the Act, are the persons who are heirs of the husband under the old law, or whether they are the persons entitled to succeed to the husband's estate under the Hindu succession Act. It is now settled law that the material point of time is the date when Succession opens; in the case of a limited owner succession opens on the date of the death of such limited owner and the law then in force would govern succession⁵⁸⁴. Hence where a female Hindu taking as limited owner the estate of a male who died before the Act alienates the estate and dies after the Act came into force, Section 14 (1) has no application and succession has to be traced to the last full owner as if he had died on the date when the limited owner died⁵⁸⁵.

15 General rules of succession in the case of female Hindu — (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16,—

(a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband,

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father, and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

(583) A S No. 444 of 1960.

(584) *Daya Singh v. Dhan Kaur*, (1974) 2 S.C.J. 145; 1974 S.C. 665; see also *Anthony Serrao v. Pethi Nacker*, (1974) 2 M.L.J. 14

(585) *Andalaya Sanyal's case*, *supra*; see also *Ramaschandran Bharti v. Sri Devi Amma*, 1974 Karn. 68.

SECTION 15—SYNOPSIS.

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|---------------------------------|--|
| 1. Scope. | 6. Heirs of the mother. |
| 2. Sons, daughters and husband. | 7. Property inherited from father or mother. |
| 3. Heirs of the husband. | 8. Property inherited from husband. |
| 4. Mother and father. | 9. Second marriage of female Hindu. |
| 5. Heirs of the father. | |

1. *Scope.*—This section provides for the devolution of property of a female Hindu dying intestate and the rules of such devolution are given in the next Section 16. The property of the female Hindu shall devolve firstly upon the sons and daughters (including the children of any predeceased son or daughter)⁵⁸⁶ and the husband; secondly, upon the heirs of the husband; thirdly upon the mother and father; fourthly upon the heirs of the father, and lastly upon the heirs of the mother. Sub-section (2) of this Section provides that any property inherited by a female Hindu from her father or mother shall devolve in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter), upon the heirs of the father and that if the property has been inherited by a female Hindu from her husband or from her father-in-law, it shall devolve in the absence of issue (including the issue of such issue) upon the heirs of the husband. When the sons and daughters including the children of any predeceased son or daughter and the husband succeed to the property, they take the property simultaneously and they succeed in preference to all other heirs. The succession of the above children of the deceased female together with her husband has priority to succession by the heirs of the husband, and the succession by the heirs of the husband has priority over succession by the mother and father of the deceased female and similarly the succession by the mother and father takes precedence over the right to succeed of the heirs of the father and again the heirs of the mother can succeed only after the heirs of the father. The mother and father when they succeed take simultaneously. So also, the plurality of heirs of the husband when they succeed by reason of their being of the same degree take simultaneously. The same rule applies in the case of plurality of heirs of the father and plurality of the heirs of the mother. *Mallappa v. Shiroappa* ⁵⁸⁷.

Where a daughter who had inherited her father's property which he had obtained on partition dies issueless, the succession to the property is governed by Sections 15 and 16 as if the property had been her father's property on account of the fiction created by the statute for ascertaining her heirs, but that cannot make the property of the father so as to attract the applicability of Section 6 which deals with devolution of interest in coparcenary property, *Arunachalammal v. Ramakandram Pillai* ⁵⁸⁸.

This section applies only to the absolute property of a female and not to the property in which she has only a limited estate of a Hindu woman as known to the original Hindu Law. The accepted position under the Hindu Law is that where a limited owner succeeds to an estate, the succession to the estate on her death will have to be decided on the basis that the last full owner died on that day. The inevitable corollary is that it is only the law in force at the time of the death of the limited owner that should govern the case. There is no reason either in principle or on authority why the principle should not apply even after the

(586) See *Manjyamma v. Venkata Subba Rao*, (1978) 2 Aa. W.R. 18; 1978 A.L.T. 274

(587) 1962 Mys. 140

(588) (1963) 1 M.L.J. 254.

coming into force of the Hindu Succession Act⁵⁸⁹ Where a female Hindu taking as limited owner the estate of a male who died before the Hindu Succession Act alienates the estate and dies after the Act came into force succession will have to be traced to the last full owner as if he had died on the date when the limited owner died.⁵⁹⁰ If the last full owner was a male then his heirs are to be ascertained, and if the last full owner was a female then her heirs must be held to succeed.

2 Son's daughters and husband.—The term 'son' includes both a natural son and a son validly adopted⁵⁹¹ Likewise since the passing of the Hindu Adoptions and Maintenance Act 1955, the term 'daughter' will include an adopted daughter. The word 'children' in the 'expression' the children of any predeceased son or daughter in Section 15 (1) (a) mean the issue of the first generation only Grandchildren of a predeceased son or daughter of a female are not within the purview of that provision⁵⁹² Sons, daughters and husband take simultaneously in equal shares If a woman dies leaving a son, a daughter and the husband, the son gets one-third the daughter gets one-third and the husband gets one-third. They take the property as co-heirs and not with the right of survivorship If the son had predeceased the mother, the sons of that son or the daughters of that son or both the sons and daughters of that son will take the son's share namely, the one-third, that one-third being divided between the children of the predeceased son equally So also, if a daughter has predeceased the mother, that daughter's children would take the share which would have fallen to that daughter equally as co-owners. If there are several sons and daughters and a husband, they share the property equally and the distribution is *per capita* except when the claimants are the children of a deceased son or daughter, in which case these claimants take the share of the deceased son or daughter *per stirpes*. The son or daughter does not include a step-son or step-daughter⁵⁹³ but they need not be born of the same husband A son born in lawful wedlock with a previous husband is not an illegitimate son and will be the preferential heirs against persons who are not direct descendants of the deceased.⁵⁹⁴ If the deceased woman had children by the first husband and after his death she married and had children by the second husband, all these children take her property equally, *Patil v. Redkar*.⁵⁹⁵ Where a woman had married twice having children by both husbands the property inherited by her from her second husband will on her death, be taken by all her children equally⁵⁹⁶. Daughter and son of the deceased include also illegitimate children and if there is the second husband alive at her death, he will also come in for a share. The husband here does not mean one whose marriage with the deceased woman had been dissolved by divorce. Nor would it take in one between whom and the woman there was not and could not have been a valid marriage. It is obvious that sons and daughters can include illegitimate sons and daughters born outside

(589) *Daya Singh v. Dhan Kaur*, (1974) 2 S.C.J. 145 1974 S.C. 665 at pp. 667, 668. See also *Servai v. Pethi Nacker*, (1974) 2 M.L.J. 19, *Dhuni Chand v. Anar Kali*, (1946) 2 M.L.J. 290 (P.C.)

(590) *Anthony Servai's case* supra. See also *Ramachandya Bhett v. Sri Devi Amma*, 1974 Karn. 68.

(591) *Bhagwanida v. Khushali*, 1977 M.P.L.J. 99; *Anasuyabai v. Jagadith*, 1977 M.P.L.J. 7; *Gurbachan Singh v. Kishar Singh*, 1971 Punj. 240.

(592) *Anasuyabai's case* supra.

(593) *Mrs. Urmila Sahu v. Dumboru Swami*, (1973) 39 Cut. L.T. 1249 [following 1962 Mys. 140 and dissenting from 1968 All L.J. 484]

(594) *Mrs. Dani v. Nathe Singh*, (1976) 76 Punj L.R. 267.

(595) 1969 Bom. 205.

(596) *Mrs. Ram Kali v. Sahan Lal*, (1972) 74 Punj. L.R. 833; 1972 Punj. 419.

lawful wedlock⁵⁹⁷ See Section 3 (1) (f) proviso. It will be noticed that the sons and daughters are the first heirs of a deceased woman whether the property left by her was inherited by her from her husband or from her father and that in the absence of issue the husband will not take the property if it had been inherited by the deceased woman from her father. But in respect of all other properties held by a woman, viz., properties not inherited by her from her father the husband is entitled to share with the sons and daughters in the first instance. If there is no son but only a daughter and husband, the latter two shall take the property in equal shares simultaneously. But if the son has left a son or daughter or both, such grandchildren will share along with the daughter and the husband. If there is no daughter or daughter's children, then the son and the husband will take equally. If there is neither a son nor a daughter nor a son or daughter of a son or daughter, the husband will take the entire property except when the property left had been inherited by the deceased woman from her father or mother, in which case the heirs of the father would take the property even to the exclusion of the husband. In the case of property left by dancing girls, their children born by promiscuous intercourse will take the property equally.

3 Heirs of the husband—The heirs of the husband are mentioned in Entry (b) to sub-section (1) and they take after the heirs mentioned in Entry (a) viz., the sons, daughters (including the children of any predeceased son or daughter) and the husband. Only in the absence of the sons and daughters of the female the property will go to the husband's heirs⁵⁹⁸. The expression "the heirs of the husband" refers to the heirs who would have succeeded under the Act if the husband had died the moment next after the female's death⁵⁹⁹. The heirs of the husband have no place when the property was inherited by the deceased woman from her father or mother because under sub-section (2) (a) such property in the absence of any issue to the deceased woman devolves upon the heirs of the father. The rationale for this disability to inherit on the part of the heirs of the husband to the property inherited by a female Hindu from her father and mother is that no parent of a woman likes the property belonging to him or her and taken by inheritance by the daughter to go to the daughter's husband or his heirs. But all other properties absolutely held by a female Hindu will devolve in the absence of an heir or heirs coming under Cl (1) upon the heirs of the husband. If the heirs of the husband are more than one and equally near, they take the property simultaneously as co-heirs with equal shares. Who these heirs of the husband are and how they would take should be determined by reference to the provisions of sections 6, 8, 9, 10, 11, 12 and 13. Where a female Hindu died intestate and there were no class I or class II heirs of the husband but only cognates of the husband as claimants and the degree of ascent was the same, the husband's mother's brother's son was preferred to the mother's brother's son's children as the latter were remoter by one degree⁶⁰⁰.

4 Mother and father—The mother and father come under Entry (c) in sub-section (1) of Section 15 and they take after the heirs of the husband. The mother and father here cannot mean the step-mother and step-father⁶⁰¹. If both the mother and father are alive

(597) *Anasuyabai's case*, 1971 M P L J 7, *Gurbachan Singh's case*, 1971 Punj 240

(598) *Keshri v Har Prasad*, 1971 MP 129

(599) *Gopikabai v Baiya*, 1971 M P L J 335

(600) *Devi Bakhtjodi v Dilli Ashari*, (1969) 2 M L J 635

(601) *Anjia v Baiyath*, 1974 Pat. 177 [mother does not include step-mother.]

they take together in equal shares. If one of them alone is dead, the other takes the whole. There is no right of survivorship as between the mother and father when they both take. In the case of a dancing girl leaving Property, her mother alone would take the property. The same rule would apply to property left by an illegitimate son or daughter. His or her putative father has no right to succeed to the property.

5. Heirs of the father.—The heirs of the father come under Entry (d) in sub-section (1) of section 15 and are to be ascertained in the same order and according to the same rules as would have applied if the property had been the father's or mother's, and the father or mother had died intestate in respect thereof immediately after the daughter's death. The heirs of the father would take in the absence of the children even as against the husband and a *fortiori* against the husband's heirs if the property left by the deceased female had been inherited from her father or mother. When the heirs are of the same degree of relationship to the deceased female as computed under the sections dealing with inheritance to males, such heirs will take together and equally without right of survivorship. As between the father's sister of the deceased and the father's brother's son, the former will be preferred, as she comes under Class II, sub-Class II (4), while the latter comes under Class II, sub-Class IV (1), *Apari v. Sana*⁶⁰³. (Entries I to IX under Class II Schedule is mentioned as sub-Class in the judgment.)

6. Heirs of the mother.—The heirs of the mother are the last of the heirs in the order of succession to the absolute property of a female Hindu. Such heirs are to be determined in accordance with the rules mentioned in this section and in the next, and the same rules as would have applied if the property had been the mother's and the mother had died intestate in respect thereof immediately after the daughter. As in the case of the heirs of the father and the heirs of the husband, the heirs of the mother also have no right of survivorship as between them and they take absolutely in equal shares as co-owners when they are equally related to the deceased female.

7 Property inherited from father or mother—Clause (a) of sub-section (2) provides that any property inherited by a female Hindu from her father or mother shall devolve in the absence of any son or daughter of the deceased including children of any predeceased son or daughter, not upon the heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father. Succession to the properties obtained by a female Hindu from her father including a share obtained by him on partition would be governed by the rules laid down in this section and Section 16 as if the property had been her father's. The statute thus creates a fiction for ascertaining her heir by treating it as her father's property but that cannot make it his property and Section 6 cannot come into the picture⁶⁰⁴. In *Narayanaswami v. Gopalaswami*⁶⁰⁵, which is a case of gift by the father to the daughter, it was contended that the gift was taken by the daughter absolutely and that on her death issues⁶⁰⁶ it devolved upon the husband. It was ruled by Mr. Justice Varadachariar, that even though the gift did not contain any qualification with reference to the nature of the estate taken by the daughter, the obvious and natural intention of the father must have been that if the daughter should die without children the property gifted should come back to his family. Though much can be said by way of criticism against the correctness of the said decision on the case-law as it then stood, there can be no question that the normal intention of a parent is that his or her property

(602) 1963 Orissa 166.

(603) *Arunachalathemmal v. Ramachandran Pillai*, (1963) 1 M.L.J. 254; 1963 Mad. 255.

(604) 1998 M. 6.

going to the daughter should not, in the absence of issue to the daughter, go to the husband or to his heirs who are strangers to the parent's family. It is that sentiment or natural intention that is found embodied in this clause; only the scope of it is restricted to inheritance from the parents. The expression "property inherited by a female Hindu from her father or mother" must be given a restricted meaning consistent with the absolute right of disposition of the female owner. The special rule of succession to such property applies only when the very property inherited by the female from her father or mother is still available, at the time of her death. Otherwise the rule will not apply. If the identity of the property is changed or if the property is substantially altered or improved or if the property has been substituted the special rule of succession can have no application⁽⁶⁰⁵⁾. Likewise the special rule of succession cannot apply where the female Hindu had taken the property under her mother's will and not by inheritance to her⁽⁶⁰⁶⁾. Where a female Hindu who derived property from her parents died intestate the husband is not entitled to succeed to the same and any dealing with it by him would be illegal⁽⁶⁰⁷⁾. Why this clause should be restricted only to inheritance and why it should not be extended to cases of gifts from the parents or other acquisitions from the parent's family of a Hindu female, it is difficult to section. However, there it is, and the disability of the husband⁽⁶⁰⁸⁾ heirs to inherit the property of a Hindu female is considered applicable only to such property as she had inherited from her parents and not to other properties, as for instance properties, gifted by the parents or otherwise acquired from the parent's family of the deceased woman *Ayl Ammal v. Subramania Ayyar*,⁽⁶⁰⁹⁾. In *Bilge; Rangamma v. Annapurnamma*⁽⁶¹⁰⁾, where in the case of the death of a female the competition with reference to the inheritance to the property left by her which she had inherited from her father was between her full sister and a half-sister, it was held that applying section 18 to the facts of the case the full sister would exclude the half-sister.

8. Property inherited from husband.—Clause (b) of sub-section (2) of Section 15 provides that any property inherited by a female Hindu from her husband or from her father-in-law shall devolve in the absence of any son or daughter of the deceased including the children of any pre-deceased son or daughter, not upon the heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband. This provision is merely the counterpart of the provision relating to property inherited by a female Hindu from her parents. What this clause prohibits is that though there is nothing to prevent her from giving such property to whomsoever she likes including her own relations in the family of her birth, still, if she dies intestate that property should not go to anybody excepting the husband's relations. Clause (b) comes into play when a female Hindu dies intestate without leaving any son or daughter. The word "deceased" in the expression "in the absence of a son or daughter of the deceased" means the female Hindu dying intestate. If the female had married again after her husband's death or divorce her children by the different marriages would all be her natural sons entitled to succeed to her property irrespec-

(605) *Vararaghnamma v. Subba Rao*, 1976 A.P. 337 cf., *Ayl Ammal v. Subramania*, (1966) 1 M.L.J. 411; 1966 Mad. 369.

(606) *Kameswara Rao v. Vasudeva Rao*, 1972 A.P. 189 cf., *Jeyanthilal v. Mahes*, 1968 GoJ. 212 [case of property obtained by gift.]

(607) *Bhomedas v. Kanthamma*, 1974 A.P. 266

(608) *Supra*.

(609) 1963 Mys. 168.

tive of the source of the property. Thus where a Hindu female succeeds to her husband's property and dies intestate leaving a daughter by her previous husband, the daughter will succeed in preference to the heirs of the husband from whom she inherited the property.¹¹⁰ It will be observed that this provision is absolutely unnecessary in view of Entry (b) in sub-section (1) having priority to Entries (d) and (e) which alone deal with mother and father and their heirs. In other words, even without this clause the object of this clause is achieved and the clause therefore is absolutely redundant and superfluous.

9. Second marriage of female Hindu.—Sub-section (2) (b) of Section 15 does not provide for a case where a woman who has inherited the property from her husband under this Act subsequently contracts a second marriage and dies leaving the second husband and issues of both her first and second marriage. Clause (1) (a) of Section 15 lays down that sons and daughters and husband will be the first heirs of the female taking together her property. The sons mean the sons by both the marriages and also the daughters of such marriages including the children of any predeceased son or daughter. The husband here must necessarily mean the second husband as the first husband was long before dead. Some questions which cannot admit of any easy answer may be posed by the following illustrations:

1. A Hindu female inherited the property of her husband who died prior to 1937 and she remarried after 1956. The property inherited by her as a qualified owner would under the provisions of this Act have become her absolute property and must descend on her death after the second marriage to her children by the second marriage and her second husband. The question is whether in default of children and her second husband by reason of the latter's death previous to the death of the Hindu female, the property left by her should go only to the second husband's heirs under clause (b) of sub-section (1) or to the heirs of both the first and second husbands. It would be reasonable to say that the property in her hands being the property of her first husband it must go only to the heirs of that husband and not to the heirs of the second husband. But it appears that the husband referred to in clause (a) of sub-section (1) of Section 15 here is the husband of the woman at the time of her death and it is proper to hold that the heirs of the husband mentioned in clause (b) are the heirs of the second husband. This construction may be unjust and may lead to an anomaly but that is the construction enforced by the language of the provisions.

2. The husband of the woman dies after this Act leaving property which becomes the absolute property of the woman. She marries again and dies leaving children and husband of that second marriage. The property of the first husband would be taken by the second husband and his children.

3. The husband dies after this Act, leaving property and children. His widow and the children take the property equally. Subsequently the widow remarries and has children by the second marriage. When she dies the property left by her including the property which she obtained for her share by inheritance from her first husband on his death would be taken by all the children of both the marriages and the second husband.

4. The husband died after 1937 as a member of a Mitakshara coparcenary without leaving children. His widow remarried prior to the Hindu Succession Act. Though she would forfeit the interest which she had taken in the coparcenary of which her first husband was a member on such second marriage, if however she continues in possession of the properties

and perfects her right to it by prescription and dies leaving the second husband and children by him, that property would be taken by her second husband as well as the children by both the husbands.

5. A woman gets a divorce from her husband and marries again and the second husband dies leaving children and property. There are also her children by the first husband. The property left by her would be taken by her children by both the husbands. But if there are no children left by her, the property would be taken only by the heirs of the second husband and not by the heirs of the first husband also.

6. A Hindu woman gets a divorce from her husband and marries a second husband. The second husband dies leaving children and property. She takes a right in that property absolutely under this Act. Subsequently she marries the first husband and dies leaving him and the property inherited by her from the second husband. This property will be taken by her children by both the husbands and her husband in equal shares even though the property formerly belonged only to the second husband.

16 Order of succession and manner of distribution among heirs of a female Hindu—The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestate's property among those heirs shall take place according to the following rules, namely—

Rule 1.—Among the heirs specified in sub-section (1) of Section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2.—If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3.—The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) of Section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

Scope—This section deals with the order of succession and manner of distribution among the heirs of a female Hindu. This shall be according to the following rules.

Rule 1.—Among the heirs specified in sub-section (1) of Section 15 those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2.—If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3.—The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of Section 15 shall be in the same order and according to the same rule as would have applied if the property had been the father's or mother's or the husband's as the case may be, and such person has died intestate in respect thereof after the intestate's death.

When a Hindu female inheriting the property of her parents jointly with her sister dies

childless and intestate leaving behind a sister and the son of a predeceased sister, the surviving sister will take $3/4$ share of the property held jointly and the son of the predeceased sister $1/4$ ⁽¹¹⁾. As between the half-brother of a female Hindu and her husband's sister, the latter is the preferential heir to her property⁽¹²⁾.

The above rules have already been considered in dealing with the specific heirs under the various entries in sub-section (1) of Section 15 and do not call for separate consideration and discussion here.

17. Special provisions respecting persons governed by *maramakkattayam* and *aliyasantana* laws.—The provisions of Sections 8, 10, 15 and 23 shall have effect in relation to persons who would have been governed by the *maramakkattayam* law or *aliyasantana* law if this Act had not been passed as if—

(i) for sub-clauses (c) and (d) of section 8, the following has been substituted, namely,—

“(c) thirdly, if there is no heir of any of the two classes, then upon his relatives, whether agnates or cognates”.

(ii) for clauses (a) to (e) of sub-section (1) of Section 15, the following had been substituted, namely —

“(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the mother;

(b) secondly, upon the father and the husband;

(c) thirdly, upon the heirs of the mother,

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the husband”.

(iii) Clause (a) of sub-section (2) of Section 15 had been omitted:—

(iv) Section 23 had been omitted

Scope—This section lays down the special provisions respecting persons governed by *maramakkattayam* and *aliyasantana* law. The heirs in the case of death of a male intestate are

(1) The relatives specified in Class (1) of the schedule; (2) If there is no heir of Class (1) then the relatives specified in Clause (2) of the schedule; (3) If there is no heir of any of the above two classes then upon his relatives whether agnates or cognates.

In the case of death of a female intestate the heirs are: (a) the sons and daughters including the children of any predeceased son or daughter and the mother, (b) secondly upon the father and the husband, (c) thirdly, upon the heirs of the mother, (d) fourthly, upon the heirs of the father, and (e) lastly upon the heirs of the husband. The above enumeration of heirs would show that there is no need for the principles of clause (a) of sub-section (2) of Section 15 dealing with property inherited by a female Hindu from her father or mother devolving in the absence of issue on the heirs of the father and hence Clause (iii) of

(611) *Shankarappa v. Gauramma*, 1973 Mys. 142.

(612) *Krishna Pillai v. Bhoopal*, (1975) 1 M.L.J. 419; 88 L.W. 49.

Section 17 omits expressly clause (a) of sub-section (2) of Section 15 with reference to inheritance to a female governed by the *marumakkattayam* and *ayyavanti* law. But the principle embodied in clause (b) of sub-section (2) of Section 15 is not avoided.

Clause (a) of Section 17 makes Section 23 relating to special provision respecting dwelling houses inapplicable to a case of succession amongst *marumakkattayam* or *ayyavanti*.

General Provisions Relating to Succession.

18. Full-blood preferred to half-blood.—Heirs related to an intestate by full-blood shall be preferred to heirs related by half-blood, if the nature of the relationship is the same in every other respect.

Scope—Even under the law prior to the Act, in the case of heirs of the same degree of relationship to the propositus, the whole-blood excluded the half blood, *Ganga v. Kesari*,⁶¹ *Nachappa v. Rangaswami*,^{61a} *Suba Singh v. Sarfayaz*,^{61b} *Grauddas v. Laldas*,^{61c} *Sham Singh v. Kishun Sahai*,^{61d} except in the Presidency of Bombay where the rule was confined in its applicability to the cases of brothers and brother's sons (*Vithalao v. Ramrao*,^{61e} *Shankar Bajji v. Kashinath*).^{61f} Having regard to the general scheme of the Hindu Law of succession the preference of the whole-blood over the half-blood was confined to the relations of the same degree (*Ganga v. Kesari*,⁶¹ *Gauddas v. Laldas*).^{61g} Section 18 deals with the preference of full-blood relations over half blood relations. For the section to apply the heirs related to an intestate by full-blood can be preferred to heirs related by half-blood only if the nature of the relationship is the same in every other respect.

The term "relationship" in the context stands correlated with the term "related" occurring in the main clause which term is fixed in its meaning to legitimate kinship [section 3 (1) (f)]. No light is shed beyond that by the definition. By the introduction of the words "if the nature of the relationship is the same in every other respect" the legislative intention seems to be that the persons who are related by full-blood shall be preferred to the relations who are related by half-blood if they have got the same relationship in degrees of ascent and descent.⁶² In *Sarwan Singh v. Dhan Kaur*,⁶² repelling the contention that as between sisters and brothers the nature of relationship is not the same in every respect the Punjab High Court observed. "For the purpose of preference this Act makes no distinction between a son and a daughter and the nature of relationship of both with the father or mother is that of a child.

(613) 30 I.C. 265. 2 L.W. 837. 37 A. 545 (P.C.). 42 L.A. 177; 13 A.L.J. 999; 17 Bom. L.R. 998 19 C.W.N. 1175 29 M.L.J. 329 1915 M.W.N. 713; 1915 P.C. 81.

(614) 2 L.W. 69; 26 I.C. 757; 28 M.L.J. 1; 1915 M.W.N. 53 (F.B.).

(615) 19 A. 215 (F.B.).

(616) 1933 A.L.J. 774 37 Cal.W.N. 637; 535 Bom. L.R. 55. 64 M.L.J. 660. 1933 M.W.N. [557; 60 L.A. 189; 37 L.W. 772; 1933 P.C. 41; 14 P.L.T. 365

(617) 6 C.L.J. 190.

(618) 24 B. 317; 3 Bom. L.R. 139.

(619) 51 B. 194; 1927 B. 97; 29 Bom. L.R. 1.

(620) *Sajan Singh v. Gurdial Singh*, 1973 Cur. L.J. 51.

(621) (1966) 68 Punj. L.R. 609; 1971 P. & H. 323.

Thus the nature of relationship of brothers and sisters, being the children of the father of the intestate is the same. The nature of relationship is to be reckoned in terms of degrees of ascent or descent or both. This section speaks of the nature of relationship being the same and not the relationship being the same." The Court held that full blood sisters will exclude half-blood brothers. It also recognised that Section 18 would not apply if an heir is preferred under any other provision of the Act. In *Purshottam v. Shripad*,⁶²² the Bombay High Court has taken a different view held and that Section 18 should be given its plain meaning, that there is no warrant for introducing the concept of equal relationship in its construction, that whole blood should be preferred to half blood only within each class of relations *inter se* and that a sister of full blood will not exclude a brother of half blood. The Bombay view is unacceptable in that it overlooks the fact that the Legislature has placed brothers and sisters on equal terms and footing in Entries II, IV, VII and IX of Class II heirs in the Schedule.⁶²³

19. Mode of succession of two or more heirs.—If two or more heirs succeed together to the property of an intestate, they shall take the property,—

- (a) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes*; and
- (b) as tenants-in-common and not as joint tenants.

Scope.—This section deals with the mode of succession of two or more heirs. The two or more heirs succeed together to the property of an intestate. They shall take the property except when expressly provided otherwise, *per capita* and not *per stirpes* and as tenants-in-common and not as joint-tenants. Heirs equally related to the deceased take equal shares *per capita*, but two or more heirs may be related to the deceased through a deceased heir as in the case of children of a predeceased daughter or predeceased son. In such a case, the children of one predeceased daughter and the children of another predeceased daughter or son take *per stirpes*. For instance if a man dies leaving three children by a predeceased daughter and four children by a predeceased son, the property will be divided half and half, the children of the predeceased daughter taking one half *per stirpes* and children of the predeceased son taking the other half *per stirpes*. But when the children of the predeceased daughter divide the half taken by them they take *per capita* each daughter getting one-sixth. There is no joint tenancy between co-heirs taking under the Act the property of an intestate. It must be noticed that even when sons take the self-acquisitions of the father on the latter's death on intestacy they take not as joint-tenants with right of survivorship but as tenants-in-common. In this there is a departure from the position obtaining under the law previous to this enactment. The position is the same when two or more daughters or co-widows succeed and they take their shares absolutely as tenants-in-common so that on the death of any of them the share of the deceased goes to her own heirs. *Nagama Neicker v. Ponnu-chinnayyan*.⁶²⁴

20. Right of child in womb.—A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the

(622) 1976 Bom. 375.

(623) See Article "Lurking Sex-Discrimination in Hindu Succession Law" by Prof. J. Duncan M. Derrett in (1978) 2 M.L.J. (Journal) p. 45. See also *Sepa Charan v. Urmila*, 1970 S.C. 1714 [no reason or justification exists to make any distinction in Class II heirs on the ground of the heirs being male or female.]

(624) 81 L.W. 623; (1970) 1 M.L.J. 437; *Nasharam v. Rambhai*, 1968 M.P.L.J. (Notes) 146.

intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.

Scope.—This section lays down the right of a child in the womb. The child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.⁶²⁵ Though clumsily expressed the intention of the section is obvious. The child here referred to is not a child in the womb of the intestate to whom the inheritance is to be traced. It means, in the womb of a relation, as in the case of a wife or daughter-in-law, and the husband or the father-in-law dying when the son or the grandson is in the womb.

21. Presumption in cases of simultaneous deaths.—Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

Scope.—This section deals with presumption in cases of simultaneous deaths and states that where two persons had died in circumstances rendering it uncertain whether either of them and if so, who survived the other, then for all purposes affecting succession to property it shall be presumed until the contrary is proved that the younger survived the elder.

Death in a common calamity or disaster known as *commorientes* leaves little scope for speculation as to who died first, and in order to provide against escheat to the State, the Roman and the French Law permitted a presumption of survivorship resulting from strength, age and sex, that is, if a stronger man and a weaker man died in a common calamity, as, for instance, fire, earthquake, ship-wreck, bomb-explosion, etc., the law raised a presumption that the stronger man survived the weaker man. Similar presumption is permitted to operate in favour of a male as against a female and a younger man as against an older individual. This presumption was not recognised in the common law of England, but has now been statutorily recognised in England by Section 184 of the Law of Property Act in a modified form, restricting the scope of the presumption only to the ground of age. But in India there was no such presumption, statutory or otherwise,⁶²⁶ and in the case of *Agha Mir Ahmad Mudassir Shah*,⁶²⁷ the Privy Council rejected the argument of survivorship based on the fact of the wife being younger than her husband when both of them perished together in an earthquake at Quetta. The Privy Council observed as follows:

"It is clear to their Lordships that when two individuals perish in a common calamity and the question arises as to who died first, in the absence of evidence on the point, there is, no presumption in law that the younger survived the elder. As was observed by Lord Chancellor Lord Campbell, in the leading English case on the subject (*Wing v. Angrey*)⁶²⁸ Such a

(625) *Ananyabai v. Jagdish*, 1977 M.P.L.J. 7

(626) See the Author's book on Indian Succession Act, 2nd Edition, p. 26.

(627) 71 IA 171 (1944) 2 M.L.J. 354.

(628) (1860) 8 H.L.C. 183.

question is always from first to last a pure question of fact, the *onus probandi* lying on the party who asserts the affirmative." This rule has not been modified in India by any statute as has been done in England by section 184, English Law of Property Act, 1925. The learned counsel however, urged that though there is no presumption in law, the survivorship of the younger should be considered as an element in the evidence bearing on the question as to who died first. As to this their Lordships need only observe that the distinction which the learned counsel seeks to draw is very thin: it is obvious that in a disaster like an earthquake it is a matter of pure chance whether the younger or the elder would be killed first. It may well be that the younger might receive injuries which cause instantaneous death, while the elder might merely be buried in the debris and eventually die of suffocation."

In *the matter of Mahabir Singh*,⁶²⁹ it was held, applying this section, that when the testator and his wife who was younger than her husband and to whom he had bequeathed his property died of gunshot wounds at the same time, it should be presumed that the wife who was the legatee under the husband's will survived the testator. Likewise where a mother and daughter were murdered on the same night and it could not be ascertained who died first, the presumption is that the younger (daughter) survived the elder.⁶³⁰ *Jayantilal v. Mehta*,⁶³¹ holds that *Illustration 6* to Section 105 of the Indian Succession Act has to give way to this section.

22. Preferential right to acquire property in certain cases.—(1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in Class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the Court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in Class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.—In this section, "Court" means the Court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other Court which the State Government may, by notification in the Official Gazette, specify in this behalf.

(629) 1969 PwJ. 66.

(630) *Padmanaraja Satty v. Gnanabandappa*, 1970 Mys. 87.

(631) 1968 Calj. 212.

SECTION 22—SYNOPSIS.

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| 1. Scope. | 4. Proposal to transfer. |
| 2. Movable property. | 5. Price for the sale of the interest |
| 3. Heirs in Class I of the Schedule | 6. Plurality of claimants for purchase. |

1. **Scope.**—This section deals with preferential right to acquire property in certain cases. Sub-section (1) provides that where after the commencement of this Act an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in Class I of the Schedule and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred. The second sub-section says that the consideration for which any interest in the property of the deceased may be transferred under this section shall in the absence of, any agreement between the parties be determined by the Court on application being made to it in this behalf and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application. Sub-section (3) provides that if there are two or more heirs specified in Class I of the Schedule proposing to acquire any interest under this section that heir who offers the highest consideration for the transfer shall be preferred. In the Explanation added to this section the Court is defined to be the Court within the limits of whose jurisdiction the immovable property is situate or the business is carried on and includes any other Court which the State Government may by notification in the Official Gazette specify in this behalf. There are 8 matters that require to be remembered regarding the applicability of this section. They are:

- (1) That this section has application only in the case of immovable property or business.
- (2) This section applies only when such immovable property or business devolves upon two or more heirs specified in Class I of the Schedule
- (3) One of such heirs must propose to transfer his or her interest in the property or business.
- (4) The right which the other heirs have to acquire the interest proposed to be transferred is not an absolute right but only a preferential right as against third parties, the other considerations being equal
- (5) The price for the transfer may be agreed upon between the parties but if not agreed upon, it has to be determined by the Court
- (6) Such determination is only on an application being made to the Court in this behalf
- (7) If the person proposing to acquire is unwilling to take it for the consideration determined by the Court he shall be liable to pay all costs of the application. and
- (8) In the case of plurality of such claimants to be preferred as against third parties, the heir who offers the highest consideration for the transfer shall be preferred.

The right of pre-emption under this section is not available in a case where property devolves by survivorship on the surviving coparceners.⁶³² Nor is the right available where

(632) *Bhola Nath v. Santosh*, 1975 Pat. 396.

the coheirs divided the properties and subsequently one of them died and his widow who took as his heir alienated her husband's property. This section is in applicable to such a case.⁶³³

When one of the coheirs transfers his interest in violation of Section 22 (1) the remedy of the other coheirs to enforce their preferential right to acquire the transferred interest is by way of a regular suit before a competent civil Court and not by way of an application.⁶³⁴ Where the party claiming preferential right under this section has not raised the necessary plea either in the trial Court or in the appellate Court he cannot raise the issue in second appeal before the High Court.⁶³⁵

Any transfer of his interest by a coheir in derogation of the preferential right of the other coheirs would be voidable at the instance of such coheirs.⁶³⁶

2 Movable property.—Movable properties fall outside the scope of this section. Presumably the Legislature must have thought that there would not be any sentiment for retaining the property in the family with reference to movable property as there is in the case of immovable property. The section ignores the case of family jewels, heirlooms and other movables to which sentimental value may be attached by the members of the family and every member would like to take them for himself. This section does not make any provision for it. Naturally when several heirs taking simultaneously should desire to acquire a particular movable property, that must necessarily be put to auction as between them and the highest bidder should be allowed to take it and if this procedure is not acceptable to the coheirs the only permissible course is for the movable property being sold to a stranger and the proceeds distributed.

3 Heirs in Class I of the Schedule.—This section has no application when the co-heirs taking the property do not come under Class I of the Schedule. The object obviously is that in the heirs in the first class the sentiment to own the particular immovable property or business will be very strong but in the case of other heirs coming under Class II or other classes of agnates or cognates, this sentimental attachment is practically nil.

4. Proposal to transfer.—There is no right in a co-heir coming in Class I to demand the sale of the interest of another co-heir to the former unless the latter co-heir proposes to transfer his interest in the immovable property or in the business. One co-heir cannot compel the other to sell the interest. It may happen that this rule will result in the dog-in-the-manger policy and enable one co-heir not amicably disposed to another heir to thwart its enjoyment by all the means in his power in a way detrimental to both the co-heirs. It is also possible if the law gives one of the co-heirs the right to purchase the interest of another co-heir willing to sell, there is a sense of satisfaction that the property does not go out of the family. As between the two, the latter is a more probable and laudable position and is hence enunciated in this section.

(633) *Kali Charan v. Champakalata*, 1972 (1) C.W.R. 207.

(634) *Sreedevi Amma v. Subhadra Devi*, 1976 Ker. 19.

(635) *Bhola Nath v. Santosh*, 1975 Pat 336

(636) *Nagammal v. Nanjammal*, (1970) 1 M.L.J. 358; *Kelakaram v. Champakalata*, *supra*; *Sreedevi Amma v. Subhadra Devi*, *supra*

5. Price for the sale of the interest—If *A* one of the co-heirs is willing to sell and *B*, another co-heir is willing to purchase, but *A* demands a higher price than what *B* is willing to offer, necessarily some third party must decide what the proper price is, and who can fulfil the role of the third party better than the accredited Court of the country? Hence the section says that if even after the determination of the proper price for the interest, the person who wanted to purchase is unwilling to pay that price, he is liable for the cost of the application. There is no provision which covers a case of the person willing to sell, but not willing to sell at the price determined by the Court. He cannot be allowed to play fast and loose with a judicial Tribunal. When the Court is approached with an application for the determination of the proper price to be paid, that determination must be respected by either party and that party must be made to suffer the cost of the application who refuses to respect the decision of the Court.

6 Plurality of claimants for purchase—When an heir is willing to sell and two or more co-heirs are willing to purchase, that co-heir who pays the higher price is entitled to purchase the interest. There is no provision here for the proper price being determined by the Court. An heir may be willing to sell his interest and the other co-heirs may be willing to purchase that interest individually, but the price offered by them may not be any where near the proper price which the property can fetch in the market. If the co-heirs can prevent the heir willing to sell from selling his interest in the market as sub-section (3) seems to suggest, then the seller will be greatly prejudiced for it is possible for the purchasing co-heirs to combine and offer due to their unwillingness or inability a price which is far below the price which the immovable property or the business will fetch if sold to a third party. Sub-section (3) implies that there is no question of a fair price. Whatever prices are offered by the purchasing co-heirs, the selling co-heir must necessarily sell to the purchasing co-heir whose price is greater than the price offered by the other co-heirs. This is an anomaly which deserves to be remedied.

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2g. Special provision respecting dwelling houses.—Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein.

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

SECTION 23—SYNOPSIS.

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| <p>by in the case of</p> <p>of the Schedule</p> | <p>4. Property consisting of a dwelling house.</p> <p>5. Wholly occupied by members of the family.</p> <p>6. The choice of male heirs for division.</p> <p>7. Right of residence.</p> |
|---|---|

1. Scope—This section deals with the partition of a dwelling house and the rights of male and female heirs of the intestate in it. This is a very clumsily expressed section

and the following discussion will show how anomalous and unjust the result would be when the section is applied to some particular cases hereunder mentioned. The following points fall to be noticed in the understanding of the section:

- (1) The section applies both when a male dies and a female dies intestate.
- (2) The heirs coming within the scope of this section must come in Class I of the Schedule.
- (3) The property left by the deceased must include a dwelling house.
- (4) The dwelling house must be wholly occupied by members of his or her family.
- (5) The right of the female heir to claim partition of the dwelling house is not claimable till the male heirs choose to divide.
- (6) Till the division, female heirs shall be entitled to a right of residence. In the case of a daughter this right of residence is available only if she is unmarried or is a widow or is living away from the husband.

This section does not apply where all the heirs consist exclusively of males or females⁶³⁷. Though the married daughter has no right of residence in the ancestral dwelling house she may come to possess that right for instance, where she has been deserted or separated from her husband or becomes widowed.⁶³⁸ But the fact that during her father's lifetime his daughter was occupying a family dwelling house with her husband will be no defence to a suit for possession by her brother after the father's death by reason of her right of residence in the family house being restricted by the proviso to Section 23⁶³⁹. Though the daughter's right to partition is postponed, she has nevertheless an interest in the dwelling house left by her father and non-impleading her as an heir in an appeal respecting the house would abate the same.⁶⁴⁰

2. Section applicable only in the case of intestacy.—This section has no application when the Hindu male or female dies leaving a will which is valid. Though the wording of the section may give scope for a contention that even if the will relates to only some of the properties of the testator this section can have no application because the words "where a Hindu intestate has left surviving him, etc." would *prima facie* indicate that the intestacy must be total and not partial, still the better construction seems to be that if a Hindu leaves a will he must be considered to have died intestate in respect of properties not comprised in the will and that to such a case also this section will apply. If under the will the dwelling house has been given there can be no question of this section being made applicable. But if the will leaves out dwelling house, then, this section will operate so far as that property is concerned because with reference to the dwelling house the Hindu has died intestate.

3. Male and female heirs specified in Class I of the Schedule.—It appears that there is a confusion in referring to the heirs specified in Class I of the Schedule even

(637) *Parbati Datta v. Laxmi Datta*, (1970) 56 Cut. L.T. 415.

(638) *Satyendra v. Amar Nath*, 1964 Cal. 52.

(639) *Nishal v. Gaurishanker*, 1971 M.P.L.J. 782; 1971 Jab. L.J. 780.

(640) *Raghuraman v. Ramprasad Singh*, 1964 B.L.J.R. 31, 1964 Pat. 206.

with reference to the heirs of a deceased female. It is obvious that the heirs in Class I of the Schedule come in for the purpose of succession to a male under Section 8 and many of the heirs mentioned in that class are not heirs at all taking simultaneously to a female as they are in the case of inheritance to a male. The object apparently seems to be that in the case of a female dying intestate such of the heirs mentioned in Class I who may be the heirs of that female taking the property together will be entitled to the benefit of this section. For instance, sons and daughters take together whether the deceased is a male or female, and this section will be applicable. So also son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, would be simultaneous heirs along with the sons and daughters both in the case of male and female deceased. When they take together they can claim the benefit of this section. But while in the case of the death of a male the section will be applicable where there is a widow of a predeceased son claiming along with the daughter and son, she cannot claim the benefit of this section when the deceased is a female because the widowed daughter-in-law does not take along with the son and daughter to the deceased female. The claim of a female heir for partition cannot materialise when there is only one male heir and that heir does not choose to divide the dwelling house.

The restriction imposed by this section has no application to widows who inherited under the Hindu Women's Rights to Property Act of 1937, and these female heirs are entitled to demand partition of the dwelling house whether the male heirs are willing or not for the partition. It was hence held in *Upendranath v. Ghutamani*,⁶⁴¹ that when a Hindu died prior to the Hindu Succession Act, leaving his widow and sons, the succession to his estate so far as his widow was concerned would be governed by the Hindu Women's Rights to Property Act of 1937 and the widow would be entitled to claim a partition of the dwelling house since that right which had already accrued to her is not taken away by Section 4 of the Hindu Succession Act.

4. Property including a dwelling house.—The words "property includes a dwelling house" may appear to suggest that if the dwelling house is the only property left by the intestate, this section has no application because the expression "includes" normally means something else also and shows there must be some property in addition to the dwelling house. Such, however, does not appear to be a reasonable construction of this section. The Legislature must have meant that if there is a dwelling house left by the intestate this section is applicable whether there are other properties left by the intestate or not, otherwise, the section would lead to this absurd construction that if the deceased has left several properties including a dwelling house the benefit of this section can be invoked, but if he or she left the dwelling house alone, the benefit is not available. That obviously cannot be the reasonable meaning of the section.

5. Wholly occupied by members of the family.—The language of the section implies that before the restriction against claiming partition operates the immovable property should be shown to be a dwelling house and that it is wholly occupied by the members of the family of the deceased.⁶⁴² "Wholly occupied by members of the family" must mean that even a portion of the dwelling house should not be occupied by somebody else. If the dwelling house should be big enough to be let out to a tenant and a portion of it is so let out, the major portion of the house being occupied by the members of the deceased's family, this section

(641) 1963 Cal. 22.

(642) *Hari Singh v. Shri Kamesh*, 1974 Raj. 197.

literally construed cannot have application. Why when there is a partial occupation of the dwelling house by the members of the family the application of this section should be ruled out is not easy to see.

6. **The choice of male heirs for division**—The provision that in the case of a dwelling house left by the intestate his or her female heirs can claim partition thereof only if the male heirs choose to divide their respective shares therein is a salutary provision designed to avoid confusion sown into the family by the female members such as the daughters and daughter's daughters whose moovings are elsewhere on account of their marriage, seeking to take away their shares and throw the male members into the streets. The disability of female heir to claim a partition when the male members are not willing to effect a partition is an echo of the law that prevailed prior to this Act under the Mitakshara under which no female entitled to share on a partition could claim a partition except when the male members of the family effect a partition. The restriction has been imposed to prevent the fragmentation of the dwelling house at the instance of female heirs. It is based on the same principle as is embodied in Section 44 of the Transfer of Property Act and section 4 (1) of the Partition Act⁶⁴³. A transferee from a female heir also will be subject to the same restriction and he cannot claim partition of the dwelling house until the male members chose to divide the same⁶⁴⁴. It will be seen that if there is only one male member, he will normally not choose to divide the dwelling house amongst his female co-heirs and is therefore in a position to render the latter's right inoperative.

7. **Right of residence.**—Every female heir is entitled to claim a partition of her share in the dwelling house when a partition is decided on by the male heirs. But till the partition takes place any female heir is entitled to a right of residence. In the case of a male dying, intestate his female heirs who are entitled to a right of residence are daughter, widow, mother, daughter of a predeceased son, daughter of a predeceased daughter, widow of predeceased son and daughter of a predeceased son. In the case of the death of a female Hindu leaving a dwelling house, her female heirs entitled to a right of residence are daughters, daughters of a predeceased son and daughters of a predeceased daughter. Whether other female heirs of the deceased woman coming under clauses (b), (c), (d) and (e) of sub-section (1) of section 15 can also claim this right of residence is more than doubtful. In the case of a daughter she shall be entitled only if she is unmarried or has been deserted by her husband or has been separated from him or is a widow. There is no provision for denying an unchaste daughter who is unmarried, the right of residence in the dwelling house even though she may be a veritable nuisance and a disgrace to the other members of the family dwelling in that house. The words "deserted by the husband" and "separated from the husband" do not mean the same thing. In the case of desertion by the husband, the husband is living away from her and is not willing to have her. In the case of separation from husband there may be cruelty on his part or other grounds which would enable the daughter to resist the husband's suit for restitution of conjugal rights or ask for judicial separation. There is no express provision for a claim of residence by the daughter in a case where there is a decree of divorce against husband. Probably that was intended to be brought in under the expression "separated" though strictly speaking it will not come under this expression. A daughter who is unmarried will lose her right of residence when she gets subsequently married and so also in the case of widowed daughter entitled to right of residence, that right will lapse on her re-marriage.

(643) *Arm Kumar v. Jaganmoh*, 79 Cal. W.N. 303; 1975 Cal. 232.

It will be seen that there is no specific provision in this section for the right of residence not being available to a daughter of a predeceased son, daughter of a predeceased daughter, widow of a predeceased son, daughter of a predeceased son of a predeceased son, widow of predeceased son of a predeceased son, when any of them marries subsequently. There are so many anomalies in this section that there is little doubt that the author of this section must have been fast asleep several times during the course of his draftsmanship hereof.

24 Certain widows re-marrying may not inherit as widows.—Any heir who is related to an intestate as the widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has re-married

This section lays down as a disqualification for succession as an heir the remarriage of a widow of a predeceased son or the widow of a predeceased son of a predeceased son or the widow of a brother if on the date the succession opens she has re-married. It is obvious that a widow of a person ceases to be his widow if she re-marries and that her relationship as an heir to another by reason of her being the widow of a relation of that other ceases when she remarries. The re-marriage must have taken place before the succession has opened. If the widow of a predeceased son or the widow of a predeceased son of a predeceased son or the widow of the brother re-marries after the succession has opened and after she has taken a share as an heir she does not forfeit her right. While the principle embodied in Section 24 points out towards the non-applicability of Section 2 of the Hindu Widow's Remarriage Act of 1856 to a widow succeeding to or acquiring absolute estate under the Act, the omission of the intestate's widow in Section 24 cannot lend support to a contrary view.⁶⁴⁵

25 Murderer disqualified—A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder

Disqualification by murder.—The principle that a murderer becomes non-existent in relation to his victim is not a rule of Hindu law but of public policy.⁶⁴⁶ It is based on justice, equity and good conscience.⁶⁴⁷ Section 25 gives statutory recognition to the principle.⁶⁴⁸ This is practically a re-statement in statutory form of a well-known principle of disqualification for succession which has already been considered in section 412 (*See Ramchaya v. Girmallappa*),⁶⁴⁹ where it has been laid down that no person who has been the murderer of another can be allowed to succeed as heir to the other. The latter portion of the section which deals with disqualification to inherit any other property in furtherance of the succession to which he or she committed the crime has reference to the commission of murder of an intervening heir with a view to accelerate succession in favour of the murderer. This section

(645) *Bhuri Bai v. Champai Bai*, 1963 Raj. 139; *Bhallabha v. Jamdhora*, 31 Cal. L.T. 570; I.L.R. (1965) Cal. 398.

(646) *Radhey Siam v. Dy. Director of Consolidation*, 1969 All. L.J. 980.

(647) *Jayappa Das v. Board of Revenue*, 1973 All. L.J. 397.

(648) *Sarwanabhatta v. Seljammal*, (1972) 2 M.L.J. 40; 84 L.W. 25.

(649) 20 L.W. 417

has to be read with Section 27 and so read the meaning will be clear. Take a case of a daughter and her son when the daughter's father is alive. Under the law of inheritance as embodied in Section 9 read with the Schedule Class I, the daughter would alone inherit to her father and not her son so long as she lives. Now if the daughter's son with a view to succeed to the property of his grandfather murders the grandfather or abets such murder he is not entitled to succeed if his mother predeceased her father and he will be considered as having died before the grandfather's death and on the death of the grandfather he will not be entitled to succeed as his heir. Supposing the daughter is alive and the daughter's son with a view to succeed to the property direct to the grandfather removes the daughter by murder, then in that case also the daughter's son will not be entitled to succeed to the grandfather. The meaning therefore of this section is that no person can succeed as heir of another either by murdering that other or any intermediate heir who will be a block in the murderer's succession, read with Section 27 the murderer alone will be disqualified. If there is no nearer heir on the death of the grandfather, the murderer's son will be entitled to succeed to the property under Entry III (1) of Class II of the Schedule. The principle underlying the section applies to both intestate and testamentary succession.⁶⁵⁰ The rule will be inapplicable when succession is not to the estate of the victim of the murderer but to the estate of a person inheriting from the murdered person.⁶⁵¹ Where a widow had been acquitted of the charge of murder of her husband the acquittal is final for the purposes of this section and it is not open to a civil Court to examine the charge independently.⁶⁵² Where a person who had participated in a murderous attack on his father along with others who were convicted of murder in that case, was given the benefit of doubt and convicted under Section 324 of the Penal Code instead of under Section 302, even then the disqualification prescribed under this section and Section 27 will operate against that person inheriting or deriving any beneficial interest in the property possessed or held by his father.⁶⁵³

26. Convert's descendants disqualified.—Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

This section lays down the disqualification of a person to succeed as heir to another when the person through whom that heir claims becomes a convert to some other religion before succession opens. Under the Caste Disabilities Removal Act the conversion of a relation does not disqualify him from succeeding as such relation to another as his heir (See Section 31). The only disqualification to inheritance on the ground of a person ceasing to be a Hindu is confined to the heirs of such convert.⁶⁵⁴ There is however an exception made if the children of such convert happen to be Hindus when the succession opens. This is possible. Take a case of two Hindu brothers A and B and one of them B becoming a convert to Christianity and getting children after such conversion. The brother B can be

(650) *Sarwantharu v. Sarwantharu*, (1972) 2 M.L.J. 49; 84 L.W. 25.

(651) *Jeenu Das v. Board of Revenue*, 1973 All 397.

(652) *Channu Lal v. Mahan Lal*, 1977 Delhi 37.

⁶⁵³ (1976) 1 An. W.R. 406; 1976 A.P. 497.

⁶⁵⁴ *J. & M. M. M.*, 1976 Cal. 272.

an heir in spite of his conversion but his children cannot be heirs to their uncle A. But if those children subsequently become converted to Hinduism and are Hindus at the time the succession opens to their Hindu uncle and are then the nearest heirs their father having died in the meantime they will be entitled to succeed as brother's children, under Entry IV of Class II of the Schedule.

27. Succession when heir disqualified.—If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

This section only confines the disqualification of a person as heir to him personally and says that it does not extend the disqualification further. The Punjab High Court has observed though obiter that this section is in the form of a declaratory enactment of the rule of Hindu law in regard to personal disqualification of a murderer from inheriting to the estate of the person whom he has murdered. To that rule has been grafted on the principle of justice, equity and good conscience that no title to the estate of the person murdered can be claimed through the murderer. He should be treated as non-existent when the succession opens on the death of the victim, he cannot be regarded as a fresh stock of descent. Section 27 has not made any change in that rule of justice, equity and good conscience⁶⁵⁵. In the absence of intestacy, Section 27 has no application.⁶⁵⁶ The particular person who is disqualified being treated as non-existent, inheritance to the intestate should be traced to the next heir and if, he happens to be the disqualified person's descendant, the disqualification does not extend to him. This section applies only to succession under this Act and not to succession under other enactments.⁶⁵⁷ See also section 413.

28. Disease, defect, etc. not to disqualify.—No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

This section removes the disqualification prescribed by the Hindu Law based upon disease, defect or deformity (See Sections 406 to 413). Unless the disqualification is one gatherable from the provisions of this Act it does not operate as a bar to succession. That means that the Act has made its intention specific that unchastity of a widow will, after the Act came into force, no longer be a disqualification in regard to her heritable capacity.⁶⁵⁸

Escheat

29. Failure of heirs.—If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government; and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

(655) *Mohendra Kaur v. Wasson Singh*, 1968 Punj 389.

(656) *Ibid.*

(657) *Jayamma Dass v. Board of Revenue*, 1975 All. 357.

(658) *Jeyalakshmi v. Ganaga Iyer*, (1972) 2 M.L.J. 50; 65 L.W. 82; 1972 Mad. 357; *Chandji Chavan Naskar v. Bhaiyashree Mendol*, 1976 Cal. 386; *Khangdhanath v. Karmadhar*, 1978 Cal. 431.

This section lays down that the Government is the heir to the estate of a deceased if he has left no heir to succeed to that estate in accordance with the provisions of this Act. When the Government take the property it does so subject to all the obligations and liabilities as any other heir would take. If such an heir has to maintain some dependants the Government also have to maintain them. The right of the Government under this section or under the general law prior to the Act is not higher than that of an heir who can inherit the estate subject to the liabilities and obligations of the heirs.*** (See Section 433.)

CHAPTER III

TESTAMENTARY SUCCESSION

30. Testamentary Succession.— *[*] Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 (XXXIX of 1925) or any other law for the time being in force and applicable to Hindus.

Explanation.—The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a *tarwad*, *tapazhi*, *illom*, *kutumba* or *kansu* in the property of the *tarwad*, *tapazhi*, *illom*, *kutumba* or *kansu* shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section **[***]

Testamentary Succession—Under this section every Hindu, male or female, is entitled to dispose of his or her property by will in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to him or her. The most important thing to notice in this section is, this section confers on every coparcener the right to will away his interest in the joint family or coparcenary property. The same privilege is extended to a member of a Marumakkattayam or Aliyasantana *tarwad*, *tapazhi*, *illom* etc. Under Section 6 the interest of a coparcener, instead of going to the other coparceners by survivorship, would go to his own heirs if he has left any of the female heirs or male heirs claiming through female heirs in Class I of the Schedule. If no such heir is left by him his interest will accrue to his other coparceners. Under the Hindu Law prior to enactment of this Act he could not will away that interest. That disability has now been removed under this section and it is now open and competent to every coparcener, whether he has heirs or not, to execute a will in respect of his interest in the coparcenary property to whomsoever he likes including a stranger. If a coparcenary consists of a father and three sons the father is entitled to execute a will in respect of his 1/4th interest in the property. The position will be the same if the father has a wife, daughter or daughter's son. So also any of his sons can execute a will in respect of his 1/4th interest in the coparcenary property, a right newly accorded to him under this section which he could not have exercised before this Act.

A Hindu widow becoming under Section 14 full owner of the property she had inherited with limited interest from her husband, prior to the Act is entitled under this section to dispose of that property by will.***

*The brackets and figure 1 omitted by Act (LVIII of 1960).

* * Repealed by the Hindu Adoptions and Maintenance Act (LXXVIII of 1956.)

(659) *Kachav Dahan v. State of Maharashtra*, I.L.R. (1970) Bom. 374: 1970 Bom. 205.

(660) *Jusla Narasimha Reddy v. Narasimha Reddy*, (1970) 1 An. L.T. 407.

This section abrogates the pre-existing Hindu law as regards testamentary disposition of undivided interest in joint family property.⁶⁶¹ Where a coparcener executed a will on 30th November, 1949 disposing of his share in coparcenary property and died issueless on 15th April, 1958 the disposition by will is valid and takes effect.⁶⁶²

Neither under the customary law nor under the Aliyasanthana Act nor under the Indian Succession Act the interest of a coparcener in any Aliyasanthana kutumba could have been disposed of by will. A definite change in the law is made by means of the *Explanation* to the section. At present a member of an undivided Aliyasanthana kutumba could dispose of his kutumba properties by will.⁶⁶³

CHAPTER IV

REPEALS

31. *Repeals*.—[Repealed by Act (LVIII of 1960)]

THE SCHEDULE

(See Section 8)

HEIRS IN CLASS I AND CLASS II

Class I

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

Class II

I. Father.

II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister

III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter

IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.

V. Father's father; father's mother.

VI. Father's widow; brother's widow.

VII. Father's brother; father's sister

VIII. Mother's father; mother's mother.

IX. Mother's brother; mother's sister.

Explanation.—In this Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood.

Schedule.—*Son*.—Under Class I the son succeeds to the father's property along with the daughter, widow and mother of the deceased. The son here means not only the son born

(661) *Poo Bano v. Babu Bano*, (1977) 38 Cut. L.T. 387.

(662) *Pratibha v. Indragan*, (1969) 2 Mys. L.J. 103.

Chandrasekhar, (1962) Mys. 72 (T.B.).

of his heirs but also a son who has been adopted by him and a son born to him by a marriage which is void under Section 11 or voidable under Section 12, or avoided under Section 13 of the Hindu Marriage Act. (See Section 16 of the Hindu Marriage Act). If a Hindu die leaving a son, daughter, widow, and mother, the son takes 1/4th share of the deceased's interest, and if the deceased is a member of a coparcenary, then each of these four heirs of his will take 1/4th of the deceased's share in the coparcenary property. An illegitimate son is, however, not an heir because under Section 3 (1) (j) proviso, an illegitimate son can be related only to his mother and *nervaz*, and not to his putative father. The old Hindu Law under which in the case of Sudras an illegitimate son was entitled to take in the putative father's property half of what he would have taken if he were legitimate as against a legitimate son, widow, or daughter or daughter's son is no longer the law and the illegitimate son goes out of the picture altogether as an heir to his father. He is no doubt an heir to the property left by his mother and is entitled to be maintained during his minority by the father.

Daughter.—Under the Hindu Law prior to the enactment of this Act, the daughter came in only after the son and widow in the line of succession. Daughter does not include an illegitimate daughter because under Section 3 (1) (j) proviso there can be no relationship between an illegitimate daughter and her putative father. Another change in the position of the daughter is that the daughter now gets an absolute interest in the property inherited by her.

When there are two or more daughters they take the property as tenants in common and not with the right of survivorship as under the old law. Each daughter takes the same share as a son and on her death her share descends to her own heirs. When a Hindu dies leaving two sons and three daughters, each son takes 1/5th of the father's property and so also each daughter takes 1/5th of the father's property. When any of the daughters dies her interest is taken by her own heirs. If the daughter had predeceased her father and leaves her own sons and daughters those heirs will take her share in the father's property *per stirpes*.

Widow.—Under the old law the widow succeeded only in the absence of the sons. Under the Hindu Women's Rights to Property Act, she succeeded to the interest of her husband in the coparcenary property and along with his sons and widowed daughters-in-law and sons of predeceased son and their widows and had only the limited interest of a woman's estate in the property inherited by her. Under this Act she has become a primary heir succeeding along with the children and the mother of the deceased taking a share equal to that of a son. Whether the widow has taken the husband's property either by inheritance as the sole heir of her husband by reason of his having died separate or she has succeeded to the interest of her husband as a coparcener of a Mitakshara joint family under the Hindu Women's Rights to Property Act, in either case she would be considered to be in possession of the property so as to get an enlargement of her interest into an absolute one which she is entitled to after the Act as such absolute owner to dispose of as she likes by way of gift or will. See *Sanku v. Natarajan*⁶⁴. If there are two or more widows all of them together take a share which is equal to that of a son or daughter (See Section 10, Rule 1). As she gets absolute interest in the property she takes as the heir of her husband, there is no question of her forfeiting that interest by immorality or even re-marriage. Nor is her unchastity a bar to her claim to succeed to her husband's estate.

Mother.—Under the old law her place in the order of succession was after the son, widow, daughter and daughter's son. Now she takes along with the son, daughter and widow. As a

the case of the widow, so also in her case, what was only a woman's estate with limited interest has been improved to that of absolute estate with powers of gift, sale, etc., and on her death the share which she takes goes to her own heirs. Her unchastity or re-marriage does not work a forfeiture of her right to inherit because neither of these will take away her motherhood to the deceased. The "mother" does not take in a step-mother who comes under Entry (VI) of Class II of the Schedule.

Divided and undivided son.—When a father dies leaving separate properties and divided and undivided sons, there is no preference shown in favour of undivided sons and the divided and undivided sons take the property equally. Explanation 2 to Section 6 to the effect that a person who had separated himself from the coparcenary before the death of the deceased is not able to claim a share in the interest of the deceased applies only to the coparcenary property and not to the separate property of the deceased father.

Posthumous son.—If at the time of the death of the father the mother is *en ventre* and subsequently gives birth to a son, that son is entitled to a share equally with other sons, and if before the birth of that son a partition has taken place ignoring him, he is entitled to reopen the partition and to have a share allotted to him as per the law. If before the death of the father a partition has taken place between him and his other sons and in that partition no provision has been made for the child in the womb, he is entitled to have that partition reopened and a share allotted to him, and the death of the father subsequently would enable the posthumous son to take not only his share by the reopening of the partition but also the share taken by the father in the partition. In the share of the father the divided sons cannot claim any interest by reason of the prohibition contained in Section 6, *Explanation 2*. If in the partition that has taken place during the father's lifetime, the father was not given any share at all, then the son born to the father and conceived after the partition could claim his legitimate share by reopening the partition and the fact that the father had died in the meantime does not affect this right. If the posthumous son was conceived after the partition between the father and his sons and in that partition the father was given a share, the posthumous son must be content with what was received by the father for his share, but the divided sons cannot claim any interest in that share.

Adopted son.—The son includes an adopted son, and the fact that subsequent to the adoption a natural son is born to the parents does not contract his right before the Act to one-fourth or one-third of the share of the *aurasa* son. The adopted son is entitled to share equally with the *aurasa*, the daughter, widow and mother.

Sons of void and voidable marriages—A marriage between persons within the prohibited degrees or which is a bigamous one or one between persons within the *sapinda* relationship is void and a nullity and can be declared as such by a decree of nullity under Section 11 of the Hindu Marriage Act. So also a marriage brought about by force or fraud or for reasons mentioned in Section 12 of the Hindu Marriage Act may be annulled as voidable. Children born of these alliances are declared legitimate so far as the parties to the marriage are concerned and the sons born of such marriages can claim to share the father's property along with the other legitimate sons of the father. The only difference between sons of void and voidable marriages and sons of regular marriages is that the former are considered as the sons of only the parties to the marriages while the latter are considered not only as the sons of the parties to the marriage but their relationship to the relations of the parties is recognised which is denied to the sons of void or voidable marriages coming under Section 11 or Section 12 of the Hindu Marriage Act.

Son of the wife by former husband or by her adoption.—In the family of the father who dies other persons who have been brought in as the sons of the wife may be living, these persons being either the sons born to the wife by her former husband and there may also be a case of a son adopted by her while she remained unmarried. Or there may be sons born to the woman before marriage by promiscuous intercourse with others. All these sons may have to be sheltered under the same roof of the husband when he has the misfortune to marry her. These persons though called sons have no right to the property of their mother's husband and cannot claim to inherit to him as his sons under the Act. They will, however, be entitled to inherit to the mother along with the other sons when she dies leaving property, even though that property might have been inherited from the husband by her, since on such inheritance her share is taken by her absolutely inheritable by her own heirs on her death.

Daughter.—In the matter of right to inherit to the father there is now no distinction between a daughter who is married and one who is unmarried or between a daughter who is well-to-do and one who is indigent. She is entitled to inherit even if she is immoral. In the matter of the dwelling house occupied by the members of the family exclusively, the daughter's right to share can be effectively defeated by her brothers not choosing to call for partition in respect of the dwelling house though they may divide the other properties, and if there is only one son, he by not choosing to have a partition of the dwelling house can see that she does not get her share in the dwelling house. She no doubt is entitled to reside in the dwelling house, but this right of residence is available only so long as she remains unmarried or is a widow or has separated from her husband or is deserted by him. A daughter who loses her right of residence by her marriage does not lose her right for ever. It is only suspended and revives when she becomes a widow, is discarded by her husband or has separated from her husband.

Adopted daughter.—Under the Hindu Adoption and Maintenance Act a father or mother when there is no daughter can adopt a daughter and she is in the same position as the daughter born to the couple. Such a daughter will also come in as the daughter entitled to inherit. But if the daughter had been adopted by the wife before the marriage either when she was not married or when she was living with a husband under a former marriage, such a daughter cannot claim to inherit to the adoptive mother's husband for she is only in the position of a step-daughter to him and he is in the position of a step-father to her.

Daughter of void and voidable marriages.—A daughter born of a void marriage under section 11 of the Hindu Marriage Act or a voidable marriage under section 12 of that Act is made legitimate under section 16 for the purpose of relationship to the parents and is therefore entitled to inherit along with the sons and daughters of regular marriages. Section 16 of the Hindu Marriage Act provides that these daughters cannot be said to be related to the other relations of the father or the mother. These daughters will also have the right of residence in the family dwelling house and in all respects their position is the same as that of the children of regular marriage with reference to the estate left by the father.

Daughters of wife.—Daughters born to the wife prior to her marriage with the deceased husband cannot claim to be daughters coming under the Act regarding the property left by their mother's husband whom she later married. Such daughters may be daughters born to her by her former husband or daughters born to her when she was unmarried. In either case they cannot be the daughters of the husband married by their mother after they were born.

They are not disabled from inheriting to their mother but her husband is not their father within the meaning of this provision and they cannot be said to be his daughters so as to be in a position to inherit to him.

Foster daughter.—Hindu Law accords no place in the line of heirs to a foster daughter as in the case of Mahomedan Law.

Daughter under an invalid adoption.—A daughter whose adoption is invalid does not lose her right in the family of her birth nor does she get transplanted into the family of adoption.

Position of sons and daughters inheriting together.—When the sons and daughters take the property of their father by inheritance, they take the property as tenants-in-common without any right of survivorship between them. If subsequent to such inheritance a daughter gets married the expenses of that marriage spent out of the common funds would be debited to her share at the partition, and the balance alone would be paid to her.

Widow.—Her position under the Hindu Law which came after the son, grand son and great grandson has now been advanced to that of a primary heir along with the son, daughter and mother and she takes an absolute estate instead of a limited estate under the law prior to the Act. Neither remarriage after the succession opened to her husband *Bharati Bai v. Champa Bai*¹¹¹ *Bhulabhai v. Jendhara*¹¹² nor her unchastity when her husband died would affect her right as the heir of her husband, and the fact that the widow had been living away from her husband at the time of his death either under mutual agreement or in pursuance of an order for judicial separation would not prevent her succession to the husband's property. But if she had been divorced by him prior to his death under an order of Court or under the custom of the community, she ceases to be his widow for the purpose of succession to his estate and should be ignored.

Widow under a void marriage under section 11 of the Hindu Marriage Act.—A difficult question may arise where a wife under a void marriage coming under section 11 of the Hindu Marriage Act claims to succeed to her husband as his widow on his death. If a decree of nullity of marriage had been obtained prior to his death, she cannot obviously claim to be his widow. If there is no such decree, a question may arise whether by reason of the declaration in that section that the marriage is null and void, she cannot put forward her claim as the widow. The answer appears to be in the negative. Under section 11 above mentioned a declaration of nullity of marriage by a decree is not necessary to hold that marriage void and even without such declaration the marriage is void in law. How can a wife under such a marriage which by statute has been declared to be void claim to be his widow on his death?

Widow under a voidable marriage under section 12 of the Hindu Marriage Act.—Section 12 of the Hindu Marriage Act declares certain marriages as voidable and the question may arise whether a wife under such a marriage can claim to succeed as the widow of the husband on his death. If the marriage had been a voided prior to the husband's death by a decree of nullity, she cannot claim to be his widow. But so long

(665) 1908 Raj. 129.

(666) L.L.R. (1905)

it has not been so avoided the marriage remains valid and the wife is not after the husband's death liable to be defeated of her right to succeed though her husband might have obtained a decree of nullity if he had chosen prior to his death. A problem, may arise if the husband had repudiated the marriage on any of the grounds of Section 12 prior to the death of the husband. The section merely says "shall be voidable and may be annulled by a decree of nullity." Since the section does not say that the marriage can be avoided only by a decree of nullity, it is plausible to contend that a repudiation by either spouse prior to the death of the husband of a voidable marriage under section 12, is sufficient to disqualify the wife from inheriting to the husband. In this connection there is difference in the phraseology of Section 11 which deals with the marriages which are void *ab initio* and that of Section 12 which deals with voidable marriages. In the former case the marriage is declared to be a nullity on a petition presented, but in the latter case the marriage is annulled by the decree. The latter section implies that the marriage subsists till it is annulled by a decree of nullity. So the answer to the question posed is that a mere repudiation of the marriage which is voidable under Section 12 prior to the death of the husband does not disable the wife from inheriting so long as the voidable marriage has not been annulled by a decree of nullity during the husband's life-time.

Position of widow amongst her co-heirs.—If the husband leaves two or more widows, they together take one share equal to that of a son or daughter or mother of the husband, but for an absolute estate. Each of the co-widows takes as co-owner without the right of survivorships and if there are other primary heirs taking with her, they are in the position of co-heirs taking by succession under Mohamedan Law with the incident of liability to pay the debts of the deceased, etc.

Widow—An anomaly—In a joint family consisting of a husband, his wife and several sons, it is easily possible, in view especially of the notoriously high percentage of infantile mortality in India, for the mother, in course of time, getting a larger share in the properties of the family than even the father. Let us take a case of a family consisting of father *A*, five sons *B, C, D, E* and *F*, and mother *G*. If each one of these sons happens to die unmarried under the scheme of succession in Class I of the Schedule, the interest of each son in the coparcenary property is taken not by the father, but by the mother. So if all the five sons happen to die, the mother will be entitled, even during her husband's lifetime, to claim 5/6th of the property as against her husband. Supposing four of the sons alone die, giving 4/6th or 2/3rd of the property to the mother, if subsequently *A* dies, his 1/6th share or interest in the property is taken by his widow *G* and the surviving son in equal shares, i.e., 1/12th in addition to the widow's 2/3rd and 1/12th in addition to the son's 1/6th. So the power of the widow predominates in family, an anomaly which had been lost sight of by the legislators. The proper thing would have been to make the father also a primary heir along with the mother, in which event this anomalous position of predominance to a woman in the family as against her husband or against her son would have been avoided.

Widow and adoption.—Where the widow had succeeded to her husband's estate before the Act and took a boy in adoption after the Act and subsequently made a settlement of property on one of her daughters the settlement cannot be impugned by the adopted son because the widow having become an absolute owner of her husband's estate when the Act came into force the son subsequently adopted could not have divested the estate which had become absolute in her hands even before the adoption.⁶⁶⁷

(667) *Punithanelli v. Ramalingam*, (1970) 2 S.C.J. 476: 1970 S.C. 1730.

Managership in the family.—If on the death of a Hindu male, his interest in the property of the coparcenary consisting of himself, his sons and his collaterals, descends under section 6 (2) to his widow, sons, and daughters, and there is a division subsequently between the deceased coparcener's branch and the collateral coparceners of the deceased coparcener, the position of the deceased coparcener's heirs living together as one family, is analogous to the position of co-heirs under the Mahomedan Law. There is no such thing strictly speaking as managership in such a family. Every member is in the position of a co-owner having a defined share in the joint property which he or she is entitled to dispose of in any way he or she likes as that share is the absolute property of that particular member. No doubt, so long as they remain joint they can depute one of themselves, it may be the mother or it may be the sister, to manage the property for the benefit of all, either under a tacit oral arrangement or under a written agreement. If there is such an agreement the members of the family are governed by the terms of such an agreement. If there is no such agreement, tacit or otherwise, none of them can deal with the interest of another even on the ground of benefit or necessity of the family. Where such an alienation is effected, thought it be for an immediate and unavoidable necessity, or for the benefit of all the members concerned, but the alienee is not able to show a consent by the other members, he cannot ask for that alienation being upheld, so as to embrace the interests of the other members as binding on them. This has been ruled by the decision of the Privy Council in a similar case arising under the Mohomedan Law. But as already said, the principle is the same and the result must be the same also. It is no doubt open to a Court in proper cases, where it finds as a fact that members of the family had the benefit of such an alienation to require them to contribute the value of that benefit to the alienee, not by upholding the alienation and giving the alienated property to the alienee but by setting aside the alienation and doing an equity by seeing that the alienee does not go out of pocket for the benefit of a stranger-family.

Liability for debts.—As under the Mohomedan Law, as well as in accordance with the principles of any civilised jurisprudence, when plurality of heirs succeed to the property of another, they are under a duty bound, both legal and moral, to discharge the debts of the deceased. If the deceased happens to be a coparcener, under the old law his interest in the coparcenary property could not be proceeded against for the realisation of a debt due from him unless even during his lifetime a decree had been obtained on that debt and his coparcenary interest had been attached in execution of the decree. See sections 289 and 310. This would be the position even now if the deceased coparcener left only lineal male descendants and no wife, mother, daughter or any of the female heirs in Class I of the Schedule or any male heir claiming through such female heirs. But if he dies leaving any of these heirs, then the property must be treated as having become his separate property to the extent of his interest in the coparcenary prior to his death, so that the heirs, namely, the son, widow, daughter and mother who take that interest will be considered to have taken that interest as his separate property attracting the liability to discharge the debt of the deceased coparcener. In such a case the fact that there has been no decree or attachment during the coparcener's lifetime cannot be a ground for denying to the coparcener's creditor the right to obtain a decree even after the coparcener's death and proceeding against his interest in the hands of the heirs. This is the clear effect of *Explanation (1)* to Section 6 of this Act.

Surrender by the widow.—Under the old law governing the Hindus, a widow who took only a limited estate in the property inherited by her from her husband, could make a valid surrender of that estate in favour of the next reversioners; being now absolute owner of the property inherited by her under section 14, there can be no question of reversioners to

the property. She can give the property to whomsoever she likes but there is no such thing as a surrender by her of that interest. Being absolute owner of her share the only way she can put an end to that interest and create a right in the property in favour of other relations, is by a deed of conveyance of that interest and not by a deed of bare surrender.

Co-widows and alienation.—Under the present Act, since every one of the co-widows will take the property as a co-owner in her own absolute right to the extent of her share therein, there is no question of the other widow having any right in it either as a joint owner or by right of survivorship.

So an alienation by a co-widow of her absolute share cannot be objected to by the other co-widow whether there is necessity or not and even though the alienation is by way of gift by her.

Mother—The place of the mother in the hierarchy of heirs under the Hindu Law came only after the son, widow and daughter and daughter's son. But now that place has been advanced to one along with the son and she is made to inherit as one of the first heirs together with the son, daughter and widow. Under the former law, she took only a limited estate in the property inherited by her but now she takes an absolute estate. As under the old law, so also under this Act, neither her remarriage nor conversion nor her unchastity operates as a disqualification to inherit to the son. The mother here means either a natural mother or an adopted mother and includes also the mother of an illegitimate son, because section 3 (1) (j) proviso says that relationship subsists between the illegitimate children and their mother. She takes the same share as a son. The share which the mother takes as the heir of her son is in addition to the share which she might have taken in a partition between the deceased son and his brothers prior to his death. A step-mother cannot come in as an heir to the step-son either prior to the Act or under the Act.

Mother under a void or voidable marriage.—There can be no difficulty in the matter of the mother's succession to her son when the son is born of a valid marriage. Nor is there a difficulty in her inheriting to the property of her illegitimate son. But the position regarding a mother whose marriage has been a nullity under section 11 of the Hindu Marriage Act or voidable under section 12 of that Act is somewhat in a cloud. The marriage being void under section 11, normally the son born of the said marriage cannot be legitimate, but by section 16 of the Hindu Marriage Act a child begotten or conceived during such a marriage has been declared to be legitimate and that section provides that such a child has rights to property of the parents but not to the property of other relations. Though no doubt that section does not specifically mention that the mother is entitled to inherit to the son of such a marriage, it follows as a necessary consequence that that should be the position because the status of the son has been declared to be legitimate. Whatever that be, he cannot be in a worse position than that of an illegitimate son. If, as already stated, a mother can succeed to her bastard son, it must be *a fortiori* in the case of a son under marriage which may be void or voidable, especially in view of the indications given expressly by section 16.

Son of predeceased son.—Under the Mitakshara School of Hindu Law, the son, son's son and son's son's son together took the property of the father as coparceners with right by birth in each of them. The position was the same whether the property taken was by survivorship as in a coparcenary of father, son, son's son and son's son's son, or the separate property of the father in which the descendants did not have a right by birth. If the father had left a son and a son's son by a predeceased son, both of them took the property

as coparceners and in a partition between them, the son's son took a half share in the right of his father and the other half share went to his father's brother. Under the Hindu Women's Rights to Property Act his position has been statutorily recognised as being on the same level as that of a son in section 3. Under the present Act, there is no question of the son's son taking any interest in the separate property of the father's father by birth or otherwise so long as that father is alive. Even after his death the son's son does not inherit to the grandfather's property so long as the son is alive under whom the son's son claimed. But if the son's son is the son of a predeceased son he takes an interest equal to that of a son who may be alive and he takes that interest along with his father's sister, father's mother or step-mother, or father's father's mother. The expression son of a predeceased son includes the adopted son of a predeceased son but not the son of a predeceased son by a void or voidable marriage. But if he happens to be the illegitimate son of a predeceased son he is not entitled to take a share in the property of his putative father's father.

The fact that he happens to be a posthumous son of a predeceased son does not disable him from inheriting to the grandfather because under section 12, the right to succeed of a child in the womb at the time of the death of an intestate is preserved.

Daughter of a predeceased son.—The daughter of a predeceased son was not one of the heirs under the original Hindu Law, her position being if at all that of only a female heir after all the Sapindas and Samanodhakas had been exhausted. Her position came to be statutorily recognised under the Hindu Law of Inheritance (Amendment) Act II of 1929 along with the daughter's daughter, sister and sister's son, coming after the father's father and before the father's brother. Her position is now advanced to that of a son, provided her father is dead at the time the succession opened, and now she succeeds along with her father's brother, father's sister, father's mother or step-mother and father's father's mother. She can also be an adopted daughter because under the Hindu Adoptions and Maintenance Act, even a daughter can be adopted by a Hindu. If she happens to be an illegitimate daughter of a predeceased son, she cannot claim to inherit to her father's father. But if she is the daughter born to the predeceased son by a void or voidable marriage, even then she cannot succeed to her father's father because under section 16 proviso no right is conferred upon any child of a marriage which is declared null and void or annulled by a decree of nullity in or to the property of any person other than the parents in any case where but for the passing of this Act, such child would have been incapable of possessing or acquiring any such right by reason of his not being the legitimate child of the parents.

Son of a predeceased daughter.—Son of a predeceased daughter includes an adopted son of such a daughter, but not her illegitimate son or son born to her under void or voidable marriage coming under section 11 or 12 of the Hindu Marriage Act. He may be a posthumous son born after his father's death or he might have been in the mother's womb at the time the maternal grandfather died and was born only subsequently. Such a son is entitled to succeed along with other heirs mentioned in Class I of the Schedule.

Daughter of a predeceased daughter.—Daughter of a predeceased daughter may be either natural daughter or daughter adopted by a predeceased daughter. But if she happens to be illegitimate or the issue of a void or voidable marriage she cannot claim to succeed to the maternal grandfather. Otherwise she takes the property absolutely and inherits along with the other heirs mentioned in Class I of the Schedule.

Widow of a predeceased son.—Under the Hindu Law the widow of a predeceased son had no place in the line of succession at all. But her claim was first recognised in the Hindu Women's Rights to Property Act. If at the time the succession opens she had remarried she is not entitled to inherit because by the remarriage she has ceased to be the surviving half of her husband, *viz.*, the predeceased son, and the fact that subsequently and before the succession opens to the father-in-law she had become a widow by the death of the second husband or has been divorced by him would not reinstate her in the position of a widow of a predeceased son. This is provided for in section 24 of this Act which says that any heir who is related to an intestate as the widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow if on the date the succession opens she has remarried. The ground of disability under section 24 is her remarriage and the fact that subsequent to such remarriage she has again become a widow would not take away that disqualification or disability. The predeceased son might have been an aurasa or adopted son and his widow who is entitled to succeed to his father may have been a widow under a valid marriage or a voidable marriage which has not been avoided. The question whether a widow of a predeceased son whose marriage was a nullity under section 11 of the Hindu Marriage Act can still claim to be a widow of a predeceased son within the meaning of Class I is not very easy to answer. But the better opinion seems to be that though under section 16 of the Hindu Marriage Act her children have been declared legitimate, the same principle must not be invoked to give her the status of a lawful wife at any rate when the marriage had been declared a nullity by a decree of Court. The position appears to be the same in the case of a voidable marriage under section 12 of the Hindu Marriage Act which has been avoided by a decree.

Son of a predeceased son of a predeceased son—As in the case of a son of a predeceased son, so also in the case of a son of a predeceased son of a predeceased son, the adopted son is also included but not the illegitimate son. Under the old Hindu Law, he was occupying the position of a great-grandson coming within three degrees of coparcenary relationship taking a right by birth in the coparcenary property in the same way as a son and a son's son, and his position was also recognised in the Hindu Women's Rights to Property Act. Under the present Act, except in the coparcenary property existing at the time of the commencement of the enactment he does not take any right in the great-grandfather's property and inherits to him only as an heir as regards the great-grandfather's separate property, along with the other heirs mentioned Class I of the Schedule.

Daughter of a predeceased son of a predeceased son.—What has been said already about the daughter of a predeceased son applies to the case of inheritance by the daughter of a predeceased son of a predeceased son. She ought not to be illegitimate but might have been adopted by her parents. She takes the absolute interest in the share she takes along with the other heir mentioned in Class I. If there are more daughters than one of a predeceased son of a predeceased son, they together take the share which their father, *viz.*, the predeceased son of a predeceased son would have taken if alive. Neither her unchastity nor her remarriage nor conversion to another religion would work a forfeiture of her right. But if her father had become a convert prior to the opening of the succession, then she will not be entitled to succeed if she was born after the father's conversion except when she has been found to be a Hindu at the time the succession opens. See section 26.

Widow of a predeceased son of a predeceased son.—What has been said about the widow of a predeceased son applies equally to the widow of a predeceased son of a predeceased son.

remarriage would work a forfeiture of her right to inherit under section 24, wherein she is specifically mentioned as being disqualified to inherit if she remarries. As already observed her remarriage is enough to work a forfeiture, even though that remarriage has been dissolved either by death or divorce or by decree of nullity when the succession opens.

Pious obligation of the son.—As already seen when the father dies leaving only a son, but not any of the female heirs mentioned in Class I of the Schedule, the son continues to be a coparcener with the deceased father's coparceners. There is nothing in this state of the family to preclude the operation of the pious obligation of the son to discharge the father's debts. The interst that has been taken by the son in such a case is still the coparcenary interest attracting to it the incidence of coparcenary property of which pious obligation of the son is one. Thus it can be safely said that when there is nothing that has happened to disturb or determine the coparcenary of the father and sons, the son's pious obligation continues. But if the father dies, leaving not only a son or sons but any of the female heirs mentioned in Class I then what descends to such heirs is not the coparcenary interest of the father, but a kind of notional separated interest partaking of the character of separate property. As in the case of heirs taking another's property, all of them will be liable to discharge the debts of the deceased and the son will also be liable whether there is pious obligation or not. This liability of the heir is in addition to the liability of the son under the pious obligation in respect of the interest which the son had taken in the property by birth.

Entry

Father.—Father is the first heir amongst the heirs mentioned in Class II and he being the sole heir coming under Entry I, he does not share the inheritance along with other heirs as in the case of co-heirs coming under Class I or coming under any of the Entries II to IX in Class II. It will be seen that by reason of making the father the sole heir and not making him one of the primary heirs in Class I, there has been a lot of anomaly and injustice done to him. As stated earlier, case can easily be imagined of a joint family consisting of father, mother and sons, and the mother in the long run getting into a position of predominance in the family by reason of her interest in the family property becoming larger than the interest of the father.

The expression "father" must undoubtedly include the adoptive father of the deceased. By the adoption the deceased had become transplanted to the adoptive family and has ceased to be a member of the natural family, with the result that the natural father of the adopted person cannot claim to inherit to him as father, since the adoptive father steps into that place as a result of the adoption. The question whether the father of an illegitimate son can claim to inherit to the deceased illegitimate son is answered in the negative by the definition of relationship in section 31(f) which confines the relationship in case of illegitimate children only to their mother and to one another, and their legitimate descendants, and does not extend the relationship to the putative father. But the father of a child of a void or voidable marriage coming under sections 11 and 12 of the Hindu Marriage Act would come under and is comprehended in the expression "father" in Entry I of Class II because section 16 of the Hindu Marriage Act makes the children born of such void or voidable marriages legitimate; but a step-son, namely, a son born to the wife by another husband or when she was leading a life of immorality and promiscuous sex life either before or after the marriage cannot claim to inherit as the son of the deceased who happened to marry his mother and as a corollary the husband of the marriage cannot claim to be the father of the step-son he not having been begotten by him as an issue of the said marriage. There is another kind of adopted son adopted by the wife not during the period of her marriage but either before the marriage or after divorce from the husband. Such adoption is countenanced under the Hindu Adoptions and Maintenance

Act section 8 which runs as follows:—"Any female Hindu who is of sound mind, who is not a minor and who is not married or if married whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind has the capacity to take a son or daughter in adoption." Under this section an adoption by an unmarried woman as well as a woman whose marriage has been dissolved would be valid and a son adopted by her either before the marriage or after its dissolution is a validly adopted son of the adopting woman. The question is whether such an adopted son can be considered to be the son of the adoptive mother's husband. The answer is in the negative. The adopted son cannot be considered to be the son of the adoptive woman's husband and consequently that husband cannot claim to be the father of an such adopted son for the purpose of succession or for any other purpose.

The right to inherit to the son given to the father is not affected by the fact that he has become converted to some other religion. Nor is that right taken away by the father having divorced the mother of that son or by marrying again another woman after the death of that son's mother.

Son's daughter's son—He comes under Entry II of Class II, and is one of the four simultaneous heirs, namely, son's daughter's son, son's daughter's daughter, brother and sister. The position of the son's daughter's son was amongst the bandhus under the Hindu Law coming after the sapindas and samanodhakas in the Mitakshara Scheme of succession. In the Dayabhaga School his rank was 25th in the line of heirs coming after the father's father's father's son. As already said he succeeds simultaneously with three others who along with him are the joint co heirs coming under Entry II of Class II. The relationship can be traced either by natural birth or by adoption. If he happens to be an illegitimate son of the son's daughter he has no right of inheritance to the mother's father's father, because in the case of an illegitimate son, the relationship is only to the mother and not either to the father or to the father's relations. So also the son's illegitimate daughter's son cannot be included on the same reasoning, but the conversion of a son's daughter's son will not be a bar to his right to inherit to his mother's father's father.

Son's daughter's daughter.—The position of son's daughter's daughter under the Hindu Law was in the ranks of bandhus inheriting after the male bandhus. The son's daughter's daughter may also be related by adoption either by herself being adopted or by her mother being adopted or her mother's father being adopted. She takes an absolute estate unlike under the old Hindu Law. If she is illegitimate by her birth or if she is a legitimate daughter of an illegitimate mother, or if she is the legitimate daughter of a legitimate mother who is a daughter of an illegitimate son of the propertor then also she cannot inherit, because in the case of illegitimate children they are not related except to their mother and the mother's illegitimate children and their legitimate issue. The fact that she happens to be the adopted daughter or that her mother was adopted or that her mother's father was adopted does not take away her right of inheritance. But if she is the issue of a void marriage the right of inheritance is taken away. The unchastity of the son's daughter's daughter is however not a bar to the inheritance nor will her conversion to some other religion operate as such a bar.

Brother.—He is also one of the four simultaneous heirs coming under Entry II of Class II and inherits along with the son's daughter's son, son's daughter's daughter and sister. The

brother may be a natural brother or an adoptive brother. So also the deceased to whom the succession is claimed may be a natural brother or an adoptive brother. The co-heirs who succeed with him can be similarly related by blood or adoption.

The brother here includes an illegitimate brother and hence such an illegitimate brother is entitled inherit even though he might have been born to the mother by one putative father and the deceased had been born to another putative father. But if the deceased happens to be legitimate and born of lawful wedlock a son born to his mother out of wedlock cannot claim to succeed as brother under this item. So also sons born by void and voidable marriages cannot claim to be brothers of a son born in lawful wedlock to the father, because under Section 16 of the Hindu Marriage Act, the sons born of such void and voidable marriages are not entitled to claim any rights in or to the property of any person other than the parents.

A brother may be a brother of full blood or half blood. But if there is a full blood brother he excludes the brother related only by half blood. See section 18.

In the case of the uterine brother he is specifically excluded as not coming under the definition of brother by the Explanation to the schedule which runs as follows: "In this schedule references to a brother or sister will not include references to a brother or sister by uterine blood."

A further question may arise when the deceased leaves two brothers one divided from him and the other undivided. Does the divided brother inherit along with the undivided brother, or is he excluded by the latter, as under the old law? Since there is no distinction made between a divided and an undivided brother in this item or any where in the Act with reference to succession it appears that both the brothers whether divided or undivided would inherit the property, as otherwise it will lead to this anomaly that a divided brother will go out of the list of simultaneous heirs under this item while a sister who has been married to a stranger family and whose position is only after the brother will inherit. Besides such a construction though in conformity with the decisions under the old Hindu Law, will lead to this anomaly that when the deceased has left a divided brother and sister, they will succeed together; but if he has left a divided brother, a sister, and an undivided brother, the divided brother will be excluded.

The fact that the brother is an apostate to Hinduism by reason of his having become converted to another religion will not disqualify him from succeeding to the properties but his children cannot claim to succeed by reason of section 26 of the Act unless such children are Hindus at the time when the succession opens. Under the Caste Disabilities Removal Act of 1850 the convert's right to succeed to his Hindu relatives is preserved as it enacts "so much of any law or usage now in force as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any such right of inheritance, by reason of his or her renouncing or having been excluded from the communion of any religion or being deprived of caste shall cease to be enforced as law in "force" and the decisions under that Act have ruled that the provisions of that Act apply only to the apostate and not to his descendants and hence when a convert left behind him descendants born in the new faith they were held not entitled to claim to succeed to the Hindu relatives of the convert. (*Vaidyalinga v. Ayyadurai*),""

When a person leaves on his death son's daughter's son, son's daughter's daughter, two brothers and a sister, the properties of the deceased must be divided into 5 shares, each o

the heirs taking one share. On this computation the two brothers together may take more than the sister or the son's daughter or the son's daughter's daughter. So also if there are several sons to the son's daughter, each of them will take a share equal to the son's daughter's daughter, the brother or sister. What is indicated in Entry II of *Class II* is not that each of the relations described takes one share in a group but all the relations take individually, the property being divided into as many shares as there are claimants coming under any of the categories of Entry II.

Sister.—Sister includes an adopted sister, as well as a natural sister born to the adoptive parents. If the deceased has been adopted then the sister born in the adoptive family alone can inherit, and not a sister born in the natural family of the adopted son. Her position under the old Hindu Law was only that of a female bandhu coming after the sapindas and samanodhakas and the male bandhus in the Mitakshara School of succession and occupying the ninth place in the hierarchy of heirs under the Dayabhaga. Under the Hindu Law of Inheritance (Amendment) Act of 1929, she was brought in amongst the nearer heirs and was made to occupy a place in the order of inheritance after the son's daughter and daughter's daughter and after father's father and before a father's brother and sister's son. The sister includes the half sister; but not an uterine sister. If she is of an illegitimate birth she can succeed to her illegitimate brother but not to a son born to the putative father under lawful wedlock, though loosely that son also may be called her brother. The question whether in the case of a sister born of a void or voidable marriage she can claim to succeed to a brother born of that marriage the answer appears to be in the negative by reason of the enactment in section 16 of the Hindu Marriage Act which says clearly and categorically that she is not entitled to claim any rights in or to the properties of any person other than the parents. So also if the brother happens to be born of a void or voidable marriage coming under section 11 or 12 of the Hindu Marriage Act, a daughter born to the husband of such a marriage cannot claim to be sister as there is no justification for regarding her to be entitled to inherit to another under relationship which does not apply while that other claims a right to succeed to the father. Neither unchastity nor remarriage nor conversion to some other religion nor the fact that she is a half-sister born to a woman of a lower caste will debar her from succeeding to her brother. She takes an absolute estate under the Act under section 14. As already said if she happens to be a uterine sister she has no right of inheritance by reason of the express prohibition in the Explanation to the Schedule of heirs.

There is one anomaly which can be noticed in the matter of the uterine sister. As already said one illegitimate sister can succeed to another illegitimate sister or an illegitimate brother. But a uterine sister cannot succeed to uterine brother. Certainly the relationship between the uterine sister and the uterine brother in a legitimate relationship under Section 3 (1) (f), but in spite of it the right to inherit is denied while in the case of illegitimate relationship as between illegitimate brother and illegitimate sister the right of inheritance is conceded.

Entry III

Daughter's son's son.—Daughter's son's son includes an adopted son; but not an illegitimate son or a son born of a void or voidable marriage, or a son adopted by the daughter's son's wife prior to her marriage or after she has been divorced.

Daughter's son's daughter.—Daughter's son's daughter includes an adopted daughter but not an illegitimate daughter or one born of a void or voidable marriage. Unchastity is not a disqualification for inheritance. She takes an absolute estate.

Daughter's daughter's son.—Daughter's daughter's son includes daughter's daughter's adopted son, but not daughter's daughter's illegitimate son or a son born to the daughter's daughter under a void marriage.

Daughter's daughter's daughter—She takes an absolute estate and includes an adopted daughter, but not an illegitimate daughter or one born of a void marriage to the daughter's daughter,

Entry IV -

Brother's son—Brother's son includes an adopted son but not one who is illegitimate or born of a void marriage. He may be of half blood or full blood, and if there are two brother's sons one of half blood and the other of full blood, the full blood excludes the half blood.

Sister's son.—The same principles applicable to the brother's son apply to the case of a sister's son.

Entry V

Father's mother.—Father's mother does not include the step-mother of the father

Entry VI

Father's widow—The step-mother is never a mother under the Hindu Law but has been brought in now along with brother's widow as a co-heir with her. A remarriage of the father's widow will not operate as a disqualification, nor does her unchastity so operate.

Brother's widow.—Brother's widow includes the widow of an adoptive brother. Her remarriage operates as a disqualification as her name is specifically mentioned in section 24 which lays down the disqualification for inheritance by some of the widows remarrying.

Entry VII

Father's brother.—Father's brother includes the half-brother of the father but when there are full and half-brothers of the father, the full brother will exclude the half-brother. A uterine brother of the father cannot claim to inherit

Father's sister—The principles governing the father's brother will also apply to this case. She takes an absolute interest in the properties inherited. Neither her conversion nor her unchastity nor her remarriage will operate as a disqualification to inheritance.

Agnates and Cognates

Succession by agnates—Section 8 (c) provides for succession by agnates in case there is no heir of any of the different relations given in the schedule. The agnates are relations who are related by blood or adoption wholly through males. Under this definition of agnates some of the heirs mentioned in Classes I and II of the Scheduled will surely come. Therefore the agnatic succession envisaged under Section 8 (c) read with Section 12 contemplates only succession by such of the agnatic relations who do not come under Class I or Class II. Such relationship may be by blood or adoption and may extend to both male and female heirs. The wives of agnates being related through matrimony are not agnates within the meaning of the definition and cannot therefore succeed unless specifically named in the Schedule. But if she is an ancestress of the propounder she can succeed because of the definition of the agnatic relationship as the relationship to her is traced through males. This agnatic relationship extends limitlessly and any agnatic relation however remote will be entitled if he or she can show that there is no nearer relation in the agnatic line. No agnatic relationship is possible by uterine blood. It will be found that daughter, sister, father's sister, and any sister, of an agnatic ancestor will be also an agnate, though she has been married into another family. Section 12 lays down the rules for the ascertainment of preferential heirs of

the agnatic relations claiming to succeed to an intestate. As already said, such relations cannot come in the list of specified heirs in Class I and Class II of the Schedule, because if they do come, they do not claim under the class of agnates, but as specified heirs in the Schedule. The rules for preference of agnatic heirs are as follows of two heirs the one who has fewer or no degrees of ascent is preferred. This means that an heir in the direct line of descent is preferred to an heir in the same line when the latter heir has more links of ascent than the former heir. For instance, son's son's son's son will be preferred to son's son's son's son's son. Here both the heirs belong to the same line namely the direct line of the deceased but the latter has more degrees of ascent than the former and is therefore excluded by the former. The second rule is where the number of degrees of ascent is the same or none that heir is preferred who has fewer or no degrees of descent. This can be illustrated as follows. Father's father's father's father and father's father's father's father's father belong to the same line of ascent but the former is preferred to the latter because the former has fewer degrees of descent than the latter, namely, five degrees against six degrees. The third rule is where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2, they take simultaneously. Such simultaneous heirship is not further complicated by preference being shown to males as against the females. An agnatic relationship as already seen may be traced to a male as well as to a female and if both of them are of the same degree of relationship they take together taking the inheritance equally.

In the case of agnatic relations traced through common ancestors a nearer relation is preferred to a more distant relation and where the common ancestors are different the relation claiming through a nearer common ancestor is preferred to a relation claiming through a remoter common ancestor. Thus father's brother's son is preferred to the father's brother's son's son because though both are tracing the relationship through the same common ancestor namely, the father's father the latter is more remotely connected than the former and hence is excluded by the former. So also the father's brother's son's son excludes the father's father's brother's son, because the former traces the relationship through a nearer ancestor, namely, the father's father than the latter who traces the relationship through a remoter ancestor, namely, the father's father's father. This is the position which is sought to be expressed by the rules mentioned in section 12 though the rules are clumsily worded and do not bring out the meaning clearly.

Succession by cognates.—Under section 8 (d) the cognates are mentioned as heirs to take the property when there are no agnates of the deceased. The cognates are persons related to the deceased by blood or adoption not wholly through males. In other words, when there are intervening females in the relationship of a person that person is called a cognate and can succeed only if there is no relation mentioned specifically in the Schedule and if there is no relation who can come as agnate. As in the case of agnates so also in the case of cognates relations by matrimony such as widows or cognates cannot come in as heirs. Cognate relationship is not restricted by any number of degrees and may extend to a person very remotely related. Unlike in the case of an agnatic relation a cognate relation may be related by uterine blood and the explanation to the Schedule which says that references to a brother or sister do not include references to a brother or sister by uterine blood is confined in its bar to the relations mentioned in the schedule and not to the cognate relations who do not come under the schedule.

TABLE OF HEIRS

UNDER THE HINDU SUCCESSION ACT

- N* = (1) In this Table *S* represents son, *D* represents daughter, *F* represents father and *M* represents mother
- (2) This Table is illustrative and not exhaustive except as to the heirs in the Schedule
- (3) The numbers represent the ranks of the heirs as given in this Table
- (4) Heirs upto 10 represent the heirs in the Schedule, heirs from 11 to 54 represent the agnate heirs and heirs beyond 54 represent the cognate heirs
- (5) The heirs numbered 1 are heirs mentioned in Case I of the Schedule and take subject to the provisions of sections 9 and 10
- (6) An agnate or cognate heir, however removed, can succeed if there is no nearer heir, and a male and a female heir, agnate or cognate, succeed together as co-heirs if they are equally near to the propertor

1 (89) — D (81) — D (87) — D (83) — D (85) — D (48) — M (47) = F	(47) — S (46) — S (49) — S (50) — S (51) — S (52) — S (53)
S (90) — S (89) — S (88) — S (87) — S (86) — S (85)	D (49) — D (50) — D (51) — D (52) — D (53) — D (54)
D (83) — D (82) — D (81) — D (80) — D (79) — D (40) — M (39) = F	(39) — S (40) — S (41) — S (42) — S (43) — S (44) — S (45)
S (84) — S (83) — S (82) — S (81) — S (80) — S (79)	D (41) — D (42) — D (43) — D (44) — D (45) — D (46)
D (77) — D (76) — D (75) — D (74) — D (73) — D (32) — M (31) = F	(31) — S (32) — S (33) — S (34) — S (35) — S (36) — S (37)
S (78) — S (77) — S (76) — S (75) — S (74) — S (73)	D (33) — D (34) — D (35) — D (36) — D (37) — D (38)
D (71) — D (70) — D (69) — D (68) — D (67) — D (24) — M (23) = F	(23) — S (24) — S (25) — S (26) — S (27) — S (28) — S (29)
S (72) — S (71) — S (70) — S (69) — S (68) — S (67)	D (25) — D (26) — D (27) — D (28) — D (29) — D (30)

THE HINDU MARRIAGE ACT (XXV OF 1955)

Preliminary

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29. Savings.
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[18th May, 1955.]

An Act to amend and codify the law relating to marriage among Hindus

Enacted by Parliament in the Sixth Year of the Republic of India as follows

1. **Short title and extent.**—(1) This Act may be called **THE HINDU MARRIAGE ACT 1955**.
- (2) It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories

INTRODUCTION

The changes in the sacramental law of Hindu Marriages effected by the Hindu Marriage Act of 1955 are fundamental and far-reaching. The religious character of the institu-

tion has been blurred in the modern notions of matrimony based upon the western culture and social outlook.

While the Hindu outlook with reference to sastric marriages has been altered considerably from the position of an indissoluble union for life to virtually that of union of convenience as it obtains in the western countries, the polygamous connection sanctioned by the sastras has been abolished once and for all by making any marriage hereafter to be performed a monogamous one. Besides all the restrictions against inter-caste and inter-communal marriages have been done away with with a view presumably to build up a homogeneous and casteless society in the future. The hope of the legislators is enshrined in the various provisions of this enactment, namely, that the Hindu fold should in foreseeable future consist of persons who will not be torn asunder by differences of sub-castes and sub-faiths. One may well hope that that time is not far distant when the Hindu community will consist of Buddhists, Sikhs, Jains and others belonging to the various sub-divisions of the main root-religion of Hinduism, and the doctrinal differences that now prevail and mar the harmonious social intercourse between them will cease to operate by the free institution of the inter-marriages envisaged by this enactment. The various forms of marriages hitherto in vogue, such as the Brahma, the Asura and occasionally the Gandharva, have ceased to have any special significance as the only form now insisted on under the Act is that which either spouse chooses to adopt as prevailing in his or her community. The extensive prohibitions of sapinda relationship have been considerably restricted in conformity with the customs in various communities which have come to look upon many of these obstacles as obsolete and unreasonable. Salutory changes based upon reason and convenience to enable the spouses to be released from impossible alliances entered into in haste only to be regretted at leisure, have been incorporated by way of provisions for judicial separation and divorce in conformity with the notions obtaining in western countries, and provisions are also made for legitimisation of the issue born of alliances which have to be subsequently annulled as void or voidable.

The Marriage Laws (Amendment) Act, 1976 (Central Act LXVIII of 1976) has ushered in great changes in the grounds for divorce and judicial separation under the Hindu Marriage Act. It has also provided for divorce by mutual consent throwing into focus the fragile character of the Hindu matrimonial tie at the present time. The amendments to the parent Act made by the Act of 1976 coupled with the provisions in the Child Marriage Restraint (Amendment) Act, 1978 (Central Act II of 1978) raising the minimum age limits of the parties to a Hindu Marriage, from 18 years to 21 for males and from 15 years to 18 for females have imparted emphasis to the consensual element in modern Hindu Marriages.

Under section 39 of the Marriage Laws (Amendment) Act, 1976, all petitions and proceedings in causes and matters matrimonial which are pending in any Court at the commencement of the Amending Act shall be dealt with and decided by such Court: if it is a petition or proceeding under the Hindu Marriage Act, then so far as may be as if it had been originally instituted therein under the Hindu Marriage Act as amended by the Act of 1976.¹

The Hindu Marriage Act introducing as it does the principle of monogamy is a law providing for social welfare and reform as contemplated by Article 25 (2) of the Constitution.²

(1) *Gudheteyi v. Varanasiyanni*, (1978) 1 M.L.J. 49: 90 L.W. 702.

(2) *G. Sanki Reddy v. G. Jayamma*, 1972 A.P. 156 (F.B.).

The Act and its provisions have been held as not contravening the fundamental Articles 14 and 15 of the Constitution of India.³

CONSTRUCTION OF THE ACT

In the construction of the provisions of this Act, the decisions that have been rendered in the English Courts as well as the rulings of the Indian Courts on the Divorce Act and kindred enactments on analogous matters can well be referred to with advantage. Wherever there is a difference in the working of a relevant statutory provision dealing with some incidence in the Hindu Marriage Act and in the Divorce Act showing a purpose for the difference in language, that difference should be scrutinised to find out why there is that difference, and invariably it will be found that the Indian legislature must have meant something different when the language is not identical. So to that extent, the decisions may have to be read with caution or qualification. Besides, there is also the difference in the outlook between the Hindu spouses and the spouses among the Christian or other community governed by the Divorce Act. The legislators, therefore, being well aware of this differential outlook, have provided in section 23 (2) that the Court should endeavour as far as possible to bring about a reconciliation between the spouses. The Court in the interest of the State and the stability of the society depending upon the peaceful harmony of the families constituting the society, will endeavour to bring the parties together, and so long as no violent breach had happened which has made the reconciliation impossible, an attempt thus made by the Court properly in the right direction rarely becomes futile and a home originally happy, unfortunately wrecked by whoever might have been responsible or blameworthy in the matter, may be again rehabilitated.

Section 1—Synopsis.

1 Confined to Hindus

3 Hindus not domiciled

2 Domicile

1. **Confined to Hindus**—The Act applies only to the marriages between spouses both of whom are Hindus. If one of them alone is a Hindu, the Act has no application.⁴ The Act has adopted for this purpose an artificial field of application of the law to include certain communities within the applicability of the Act irrespective of the fact that they are not Hindus.⁵ The expression 'Hindu' has a special definition and can be described for shortness of description as one living or domiciled in India who is not a Muslim, Christian, Parsi or Jew by religion, whatever other religion he may have or may not have, unless it is shown that he is not governed by Hindu Law or a custom or usage which is part of that law. For a fuller discussion on this question, reference can be made to the commentaries under section 2 of the Hindu Succession Act of 1956.

2. **Domicile**.—The Act applies not only to the Hindus in India but also to Hindus living outside India provided they are domiciled in India. It is not enough for the applicability of the Act if one of the parties alone has an Indian domicile.⁶ The question of domicile may assume importance only when the marriage between the parties is prohibited by the

(3) *Hussain v. Nagai*, 1959 Manipur 20, *G. Sanku Reddy v. G. Jayamma*, 1972 A.P. 156 (F.B.).

(4) See however *Pranila Khosla v. Rajmukh Khosla*, 1978 Delhi 78 [One party Hindu and the other Christian. Relief can be had under the Act].

(5) *Commissioner of Wealth-Tax v. Champa Kumari*, 72 Cal. W.N. 660; 1968 Cal. 74 (Jains).

(6) *Gowdopal Ray v. Sybra Ray*, 1978 Cal. 163 (F.B.).

domestic rule or law of the land to which one of the parties, a foreigner may belong.' For the meaning of domicile and the incidents thereof, reference may be made to the commentaries under the Hindu Succession Act and the Author's commentaries under the relevant sections of the Indian Succession Act

3 Hindus not domiciled.—There are Hindus who are residing in India and who are living outside India but who are of Indian domicile. There can be no doubt that the Act applies to such persons. But there are also Hindus strictly so-called but who are living outside India and who have adopted the domicile of the country in which they are living. To these Hindus the Act can have no application, and they will be governed by the old Hindu Law prior to this enactment or by the law of the country which they adopted. In the absence of proof that they have chosen to be governed by the law of the adopted country, or where the law of the adopted country does not prevent the personal law of the Hindus being made applicable to them, they will be presumed to be governed by the Hindu Law which they had carried with them where they migrated from the Indian shores.

2. Application of the Act.—(1) This Act applies—

- (a) to any person who is a Hindu by religion in any of its forms or developments, including a *Virashaina*, a *Lingayat* or a follower of the *Brahmo*, *Prarthana* or *Arya Samaj*;
- (b) to any person who is a Buddhist, Jaina or Sikh by religion; and
- (c) to any other person domiciled in the territories to which this Act extends, who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed:

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

- (a) any child, legitimate, or illegitimate, both of whose parents are Hindus, Buddhists, Jainas, or Sikhs by religion;
- (b) any child, legitimate or illegitimate one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and
- (c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion

(2) Notwithstanding anything contained in sub-section (1) nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

(7) *Prem Singh v. Dulari Bai*, 77 Cal. W.N. 593 [O of the parties = Nepalese national].

Section 2—*Synopsis*

- | | |
|---------------------|--|
| 1. Hindu. | 9. Sikh. |
| 2. Virashaivite. | 10. Legitimate children |
| 3. Lingayats. | 11. Illegitimate children |
| 4. Brahmo Samajist. | 11-A "Brought up as a member etc." |
| 5. Prarthana. | 12. Converts and reverts to the Hindu religion. |
| 6. Arya Samajist. | 13. Scheduled Tribes |
| 7. Buddhist. | 14. Hindu need not belong to the Hindu religion. |
| 8. Jain. | |

1. **Hindu.**—It is difficult to define with precision the expression "Hindu." As already discussed in section 23 of this book, the difficulty in defining the expression does not prevent a man being known as a Hindu or not. One who has been in India for a fairly long time and has moved with its people and known their customs and manners can easily pick out a Hindu in a crowd of miscellaneous mortals practically in any part of the globe. There is in his appearance and bearing and the way he moves and behaves a special and an indefinable indication which distinguishes and shows out to the world "This is the man." Parliament therefore wisely refrained from attempting the impossible task of defining a Hindu beyond contenting itself with a fairly comprehensive, though a negative, definition by excluding persons who are not Hindus. Thus in clause (a) of section 2 the enactment is that the Act applies to all persons who are not Muslims, Christians, Parsis or Jews, and if such persons are not to be governed by the Act it must be shown that they would not have been governed by Hindu Law or by custom or usage as part of that law in respect of any of the matters dealt with by the Act if the Act had not been passed.

2. **Virashaivite.**—See commentaries under section 2 of the Hindu Succession Act.

3. **Lingayats.**—See commentaries under section 2 of the Hindu Succession Act.

4. **Brahmo Samajist.**—See commentaries under section 2 of the Hindu Succession Act.

5. **Prarthana.**—See commentaries under section 2 of the Hindu Succession Act.

6. **Arya Samajist.**—See commentaries under section 2 of the Hindu Succession Act.

7. **Buddhist.**—See commentaries under section 2 of the Hindu Succession Act.

8. **Jains.**—See commentaries under section 2 of the Hindu Succession Act.

9. **Sikhs.**—See commentaries under section 2 of the Hindu Succession Act.

10. **Legitimate children.**—Persons born to Hindu parents and of legitimate birth are Hindus governed by the Act unless it is shown they have given up the Hindu religion. Mere non-performance of the Hindu ritual or even disbelief in some of the essential doctrines of the Hindu religion will not take them away from the fold of the Hindu religion because that religion itself is a very elastic one giving countenance to all shades of religious or irreligious views. It must however be noticed that it is not necessary that a legitimate child should be the offspring of parents belonging to the same religious group, namely, Hindus, Buddhists, etc. In other words, a child born to a Hindu mother and Jain father will still be a Hindu and governed by this Act even though the parents belong to two different faiths. So also the child of a Brahmin mother and Sudra father lawfully married under the Act will be governed by this Act.

11. **Illegitimate children.**—As in the case of legitimate children, so also in the case of illegitimate children, the parents may belong to different faiths, for instance, the father may be

a Hindu and the mother a Buddhist. Besides, an illegitimate child may be governed by this Act even when one of its parents is a non-Hindu as defined by this Act. For instance, the father may be a Hindu and the mother a Muslim or Christian. In such a case it is necessary that the child should have been brought up as a Hindu, as a member of the tribe, community group or family to which the Hindu parent belongs or belonged. The use of the words "belongs or belonged" while referring to the Hindu parent, shows that if the illegitimate child is brought up as a Hindu and one of its parents was a Hindu, the fact that subsequent to the birth of the child the Hindu parent has ceased to be Hindu or is dead, would not prevent the child being governed by this Act.

11.A. "Brought up as a member etc."—The requirement under *Explanation (b)* to Section 2 (1) that the child should have been brought up as a Hindu etc., is inbuilt in the *Explanation* itself. For invoking the *Explanation* it is necessary to establish that the child in question has been brought up as a Hindu before he can be said to be a Hindu⁸. *Explanation (b)* expressly provides for the conferment of the status of a Hindu on a person even though such status is doubtful when the personal law of the parties is invoked. If a son of a parent belonging to a regenerate class inducts the child into the Hindu family and brings him up as such, then the statute invests him with the status of a Hindu and recognises him as a Hindu⁹.

12. Converts and re-converts to the Hindu religion.—Decisions have now established that a person need not be a Hindu by birth to be governed by Hindu Law, and that a person born in some other religion may also choose to be governed by Hindu Law if he becomes a convert to the Hindu religion. The excellents of the Hindu religion are progressively appreciated in the western countries, thanks to the work of the Ramakrishna Mission and similar bodies, and cases frequently arise about the applicability of the Hindu Law to such of those originally non-Hindu persons who have chosen to embrace the Hindu religion. There is now no doubt that Hindu Law must be held to apply to such converts also. It must be *fortiori* in the case of persons who were originally Hindus but who became converted to some other religion and then come back to their religion of origin. How such conversion or reconversion is effected has already been discussed in Sections 29 and 38 of the book. The Act applies also to converts to Hinduism, *Seethalakshmi Ammal v. Ponnuswami Nadar*¹⁰.

13. Scheduled Tribes.—The Scheduled tribes are not to be governed by this Act unless the Central Government by notification in the Official Gazette otherwise directs. See the commentary under Section 2 of the Hindu Succession Act.

14. "Hindu" need not belong to the Hindu religion.—Sub-section (3) of this section makes it perfectly clear that to be governed by this Act one need not belong to or profess the Hindu religion. He may be an atheist, he may be an agnostic, and he may even be one who shows open hostility to the tenets of the Hindu faith. But he can still be governed by this Act if he does not belong to the Islamic, Christian, Parsi or Jewish religion. If he does not belong to any of these four religions and if he is not able to show that he is not governed by the Hindu Law or Hindu customs, this Act will be held applicable to him.

(8) *Commissioner of Income-tax, Madras v. Venkatasubramanian*, (1977) 100 L.T.R. 247; 1977 Tax. L.R. 1108.

(9) *Aritharan v. Commissioner of Wealth-tax*, (1970) 2 S.L.J. 304; 1970 Mad. 205.

(10) L.L.R. (1958) 2 Ind. 373; 80 L.W. 126 (1957) 2 S.L.J. 334.

3. Definitions.—In this Act, unless the context otherwise requires—

(a) the expression “custom” and “usage” signify any rule which having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

(b) “district Court” means in any area for which there is a city civil Court, that Court, and in any other area the principal civil Court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act,

(c) “full-blood and “half-blood”—two persons are said to be related to each other by full-blood when they are descended from a common ancestor by the same wife and by half-blood when they are descended from a common ancestor but by different wives,

(d) “uterine blood”—two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands

Explanation.—In clauses (c) and (d), “ancestor” includes the father and “ancestress” the mother;

(e) “prescribed” means prescribed by rules made under this Act,

(f) (i) “*Sapinda* relationship” with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother and the father (inclusive), in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation :

(ii) two persons are said to be “*Sapindas*” of each other if one is a lineal ascendant of the other within the limits of *Sapinda* relationship, or if they have a common lineal ascendant who is within the limits of *Sapinda* relationship with reference to both of them,

(g) “degrees of prohibited relationship”—two persons are said to be within the “degrees of prohibited relationship”—

(i) if one is a lineal ascendant of the other; or

(ii) if one was wife or husband of a lineal ascendant or descendant of the other; or

(iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or

(iv) if the two are brother and sister, uncle and niece, aunt and nephew or children of brother and sister or of two brothers or of two sisters.

Explanation—For the purposes of clauses (f) and (g), relationship includes—

- (i) relationship by half or uterine blood as well as by full blood;
- (ii) illegitimate blood relationship as well as legitimate;
- (iii) relationship by adoption as well as by blood, and all terms of relationship in those clauses shall be construed accordingly.

Section 3—Synopsis

- | | |
|-------------------------------|-----------------------------|
| 1. Custom and Usage. | 5. Prescribed. |
| 2. District Court. | 6. Stepda relationship. |
| 3. Full blood and half blood. | 7. Prohibited relationship. |
| 4. Uterine blood. | |

1. **Custom and Usage**—See commentaries under section 3 of the Hindu Succession Act. Going through certain ceremonies with the intention that the parties be taken to be married will not make them ceremonies prescribed by law or approved by custom.¹¹ Section 2 treats Buddhists as a class different from Hindus and therefore if the parties had not converted themselves into Buddhism at the time of marriage and there is no proof that the Buddhist form of marriage was recognised as a custom in the particular case to which the parties belong, their marriage according to Buddhist rites cannot be treated as a valid marriage. The fact that such marriages had been taking place for 10 or 15 years is not enough. Nor can any exodus from the Hindu into the Buddhist religion lead to Buddhist rites achieving the status of custom or usage for purposes of marriage.¹²

2. **District Court**.—District Court has been defined to mean the City Civil Court where there is one, or the principal Court of original jurisdiction in other areas or any Court notified by the State Government to have jurisdiction under this Act. Courts other than the principal civil Court of original jurisdiction, which, by notification made under Section 3 (4) are conferred with jurisdiction to entertain proceedings under the Act, are not District Courts proper and irrespective of valuation an appeal would not lie against the decree of such Courts to the High Court.¹³ The expression "District Court" does not imply the District Judge alone. It includes the Additional District Judge also. When once a petition under the Act is presented in the District Court and is by transferred by the District Judge, to the Additional District Judge, the latter has power to dispose of the matter.¹⁴ The District Court as defined in Section 3 (4) being a Court of exclusive jurisdiction for only matters falling within the Act, cannot grant relief other than those provided, in the Act (for instance, injunction to restrain a projected second marriage by the husband).¹⁵

3. **Full blood and half blood**.—See the commentaries under Hindu Succession Act, Section 3.

4. **Uterine blood**.—See the commentaries under Hindu Succession Act, Section 3.

5. **Prescribed**.—means prescribed by the rules made under this Act: See Sections 8, 14 and 21.

(11) *Bhawan v. State of Maharashtra*, 1965 S.C. 1564.

(12) *Shankar v. Nithani*, 1971 Mah. L.J. 510.

(13) *Arising Chavan v. Hemant Kumar*, 1978 Ori. 168.

(14) *Rajamma v. Krishnamma Naidu*, (1964)-1 An. W.R. 287; 1964 A.B. 460; 438 Kugan v. Kanna, 1980 Cal. 565.

(15) *Unnikrishnan v. Rajan Devi*, 1967 Pat. 220.

In the above Table D stands for daughter and S stands for son. The boy to be married cannot choose any of the daughters as his wife, as they are all his sapinas. D-4, D-11, D-19, D-26 and D-33 claiming through the mothers to the common ancestor are within three degrees from the common ancestor and the rest of Ds, namely 32 of them claiming through their father are within five degrees from the common ancestor, and the boy being within three degrees from his maternal ancestor and within five degrees from his paternal ancestor is a sapinda of all the 38 Ds, and hence cannot marry any of them. This sapinda relationship is applicable even when the relationship is by half or uterine blood or illegitimate blood or when the relationship is by adoption.

7. **Prohibited relationship.**—Sub-section (g) of this section defines prohibited relationship for marriage as that of a lineal ascendant or the wife of such ascendant or the descendant of the boy or the lineal ascendant or the husband of such ascendant or descendant of the girl, the wife of the brother, father's brother, mother's brother, grandfather's or grandmother's brother, etc. From the boy's point of view he cannot marry—

- (a) a female ascendant in the line
- (b) wife of a descendant in the line
- (c) wife of the brother
- (d) wife of the father's brother
- (e) wife of the mother's brother
- (f) wife of the grandfather's brother
- (g) wife of the grandmother's brother
- (h) sister
- (i) brother's daughter
- (j) sister's daughter
- (k) father's sister
- (l) mother's sister
- (m) father's sister's daughter
- (n) father's brother's daughter
- (o) mother's sister's daughter
- (p) mother's brother's daughter

Similarly from the point of view of the girl she cannot marry—

- (a) her lineal ascendant like father, father's father etc.
- (b) the husband of a lineal ascendant
- (c) the husband of a lineal descendant like the son-in-law, husband of son's daughter, etc.
- (d) brother
- (e) father's brother
- (f) mother's brother
- (g) brother's son
- (h) sister's son
- (i) father's brother's son
- (j) father's sister's son
- (k) mother's brother's son
- (l) mother's sister's son

It will be seen that many persons within the sapinda relationship and the prohibited degrees-overlap. It will also be seen that some of these relations can marry under the

custom of the particular communities. For instance the marriage of a Hindu male with his sister's daughter is very frequent even amongst the high caste Hindus in Southern India.

As in the sapinda relationship, so also here, the relationship should be understood as including half-blood and illegitimate relationship as well as relationship by adoption.

Under Section 11 any marriage within the prohibited degrees or within the sapinda relationship contracted after the commencement of this Act is null and void and a declaration to that effect by a decree of nullity can be obtained by a petition presented by either party. The marriage being void and a nullity, either party can contract a valid marriage with another ignoring this void marriage even without obtaining a decree of nullity, and such second marriage will not attract the offence of bigamy under Section 17. But the children born of such void marriages are not without rights. They are recognised as legitimate children of the parents having the same rights as the legitimate child born to the parents or either of them subsequently under a valid marriage. But the children of such void marriages cannot claim rights as against the other relations of the parents on the ground of such legitimacy.

It would be seen that the relations mentioned as coming within the prohibited degree are either close kinsmen or relations marriage with whom will be abhorrent to decency and sentiment. It would also be seen that the prohibition against the marriage of brother's wife or the uncle's wife applies even though the brother or the uncle is dead at the time of the marriage or the wife of the brother or the uncle has been divorced at the time. See Section 55 of the book.

4. Overriding effect of Act.—Save as otherwise expressly provided in this Act—

- (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
- (b) any other law in force immediately, before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

Overriding effect of the Act.—The provisions of the Act override all the Hindu Law Texts, rules and interpretations thereof by Courts or commentators which are inconsistent with the said provisions or covering matters embraced in these provisions. The Act is exhaustive on the law relating to marriage among Hindus. The Act supersedes all existing laws, statutory and customary. However, this is subject to the express saving provisions contained in the Act.¹⁶

When a particular branch of law is codified it is intended and the object essentially is that on any matter specifically dealt with by that law, it should be sought for in the codified enactment alone when any question arises relating to that matter. The Court is not at liberty to look at any other law. Hence unless in any other enactment there is a provision which abrogates any provisions of the Act either expressly or by necessary implication the

(16) *Madhava Nair v. Radhama*, 1979 Ker. L.T. 61.

provisions of the Act alone will be applicable to matters dealt with or covered by the same.¹⁷ The Hindu Marriage Act contains no remedy for the prevention of an act of bigamy by an application or petition permitted by it for that purpose. A suit therefore is not impliedly barred by Section 4 (a). Nor is there anything in the Act inconsistent with the provisions of Section 9, Civil Procedure Code for Section 54 of the Specific Relief Act. It cannot therefore, be said that the civil Court's jurisdiction is barred by Section 4 (b).¹⁸ There are various customs and usages observed as part of that law but not altogether in conformity with the prescriptions in the Sanskrit works, and even these customs, unless saved by the provisions of this Act, can no longer have any application. But there are certain customs which have been expressly countenanced and permitted to continue. For instances of such permissible customs, one can look to the exceptions to the sapinda relationship and prohibited degrees which are allowed to operate even after the Act under custom.

Coming to the statutory provisions that prevailed prior to the Act and which are allowed to continue the provisions of the Acts remaining unrepealed may be instanced. Most of the Acts relating to marriage have been repealed, but the Special Marriage Act is still applicable to Hindus who marry under that Act. See Sections 29 and 30 of this Act relating to savings and repeals and the commentaries under them.

Where an order of dissolution of marriage had not been passed in proceedings therefor under a special law (The Travancore Nair Act) prior to its repeal by the Hindu Marriage Act, such an order cannot be passed thereafter except in accordance and conformity with the provisions of the Hindu Marriage Act whether the matter was pending in the Court of first instance or in the appellate Court or in the revisional Court.¹⁹

After the enactment of the Act, the only Court which has jurisdiction in respect of restitution of conjugal rights is the District Court, and the jurisdiction of the regular Courts other than the District Court to entertain suits for such relief has been taken away by implication under Section 4 of the Act. *Bharawan Bai v. Lala Ram*.²⁰

In view of this section only an application and not a suit is maintainable for restitution of conjugal rights or for any other relief provided for under this Act. *Boothu Bai v. Durga Prasad*.²¹

The Act has been held not to be *ultra vires* on the ground that it imposes monogamy on the Hindus where such imposition is not there for the Muhammadan community *Heimaga v. Ningol*.²²

(17) *Rohini Kumari v. Narendra Singh*, (1972) 1 S.C.J. 487; 1972 S.C. 459 [S. 10 of the Hindu Marriage Act and S. 18 (2) of the Hindu Adoptions and Maintenance Act are quite distinct provisions and one cannot control the other] See also *Chenchiah v. Mangamma*, (1968) 2 An. W.R. 98 [S. 488, Cr. P.C. is not inconsistent with S. 24 H.M. Act and hence by reason of S. 4 (b), S. 24 does not override S. 488, Cr. P.C.]

(18) *Shankarappa v. Basamma*, 1964 Mys. 247.

(19) *Madhavan Nair v. Radhakumary*, 1979 Ker. L.T. 61.

(20) 1 L.R. (1963) 1 Punj. 84; 1963 Punj. 118.

(21) 1959 M.P. 410.

(22) 1959 Manipur 20; see also *G Sambhi Reddy v. G Jayamma*, 1972 A.P. 156 (F.B.). Cf. *Madhavan Nair v. Radhakumary*, 1974 Cr. L.J. 227 [if subsistence of prior marriage is not proved, the second marriage cannot be held to be invalid].

HINDU MARRIAGES

5. Conditions for a Hindu marriage.—A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled namely—

(i) neither party has a spouse living at the time of the marriage,

*(ii) at the time of the marriage, neither party—

0 (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind, or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity or epilepsy]

(iii) the bridegroom has completed the age of, ** twenty-one years] and the bride the age of eighteen years]** at the time of the marriage,

✓ (iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

✓ (v) the parties are not Sapindas of each other, unless the custom or usage governing each of them permits a marriage between the two,

(vi)

*

Section 5—Synopsis

1. No spouse must be living.

4. Prohibited degrees.

2. Unsoundness of mind etc.

5. Sapinda relationship.

3. Age of the persons to be married.

6. Clause (vi)

1 No spouse must be living—A monogamous marriage is the only valid marriage under the Act. No one can marry another if the spouse of either is living at the time. Thus a man whose wife is living and between whom there has been a valid marriage which is subsisting cannot marry another wife, and if he does so, the offence of bigamy is committed by him attracting the applicability of Section 17 and the second marriage is void. So also a woman whose husband is alive and their marriage is valid and subsisting at the time, cannot marry another husband, and she will be committing the offence of bigamy and the second marriage will be void. But the parties to a void marriage coming under Section 11 can ignore that marriage it being void *ipso jure*, and contract a valid marriage. ** So also if there has been a dissolution of the marriage either by a decree of nullity under Section 12 or by decree of divorce under Section 13, either party to such a marriage is at liberty to marry again and the prohibition of Clause (i), of this section against marrying a person whose spouse is living at the time of the marriage can

* Clause (ii) substituted by the Marriage Laws (Amendment) Act LXVIII of 1976, Section 2.

** Substituted for the words "eighteen years" and "fifteen years" respectively, by the Child Marriage Restraint (Amendment) Act, 1978.

*** Omitted by *Ibid*, Section 6 and Schedule.

(23) *Krishni Devi v. Talsan Devi*, 1972 PwJ 303.

have no operation. Where at the time of the second marriage the husband had obtained a decree for dissolution of his marriage with the first wife merely because the period of one year prescribed in the proviso (now omitted by Act LXVIII of 1976) to Section 15 had not expired, it cannot be said that the previous wife was "a spouse living" at the time of the second marriage. The second marriage was not violative of Section 5 (i) and it was not void.²⁴ On the question whether the former husband or wife is alive or dead at the time of the second marriage, the fact that he or she has not been heard of for a period of seven years by those who are likely to have heard of him or her, raises a presumption that he or she is dead at the time, and it is open to the other spouse to contract a second marriage on the footing that the former marriage had been dissolved by death, *Lal Chand Marwari v. Mahant Ram Rup Gur.*²⁵ and in such a case the onus of proving that the former spouse is alive is on the person applying for a decree of nullity of the second marriage on this ground, *Greenwood v Greenwood*²⁶ *Bai Naicken v. Achamma.*²⁷ It must not be forgotten that apart from the presumption enacted in Section 108 of the Evidence Act regarding the death of a person who has not been heard of for seven years by those who would naturally have heard of him if he were alive it is also permissible to presume death from absence before the expiry of seven years from his disappearance in the peculiar circumstances of any particular case. Thus a presumption of death can be made in the case of a person who embarked on a ship which has not been heard of for a sufficiently long time justifying the inference that she must have been sunk. So also in the case of a passenger boarding an aeroplane. Such and similar circumstances can easily be imagined to justify an inference of the death of the spouse of the earlier marriage so as to enable the surviving spouse to contract a valid marriage subsequently. *Tisdale v. C.M.L. Insurance Co.*²⁸

While it is open to either party to a void marriage under section 11 to ignore that marriage and contract a valid marriage with another, the same cannot be said about the voidable marriage coming under section 12. In the latter case the marriage is valid till it is annulled by a decree of nullity and so long as it has not been so avoided, the marriage must be considered to be subsisting preventing either spouse to such a voidable marriage from contracting a second valid marriage. It may even be said as a measure of precaution that as regards void marriages coming under section 11 also, it is safer to get it declared null and void by a decree of nullity before actually going through the second marriage.

The question whether Section 5 (i) would give a right to either party to restrain the other by an injunction from marrying another has to be answered in the affirmative, though there is no specific provision in the Hindu Marriage Act providing for such a remedy, *Uma Shankar v. Rajadepa*.²⁹ But the general right of a party to a preventive relief by way of injunction cannot be denied in the case of a threatened injury like one of the spouses marrying

(24) *Lala Gupta v. Laxmi Narain*, 1978 S.C. 1351 [overruling 1971 Cal. 397 and reversing I.L.R. (1969) 1 All. 92; 1975 Cal. 45 also no longer sound law]

(25) (1925) 42 T.L.R. 159 (P.C.)

(26) 1946 Mad. 63.

(27) 41 M.L.J. 295.

(28) 26 Iowa 170.

(29) 1967 Pat. 220.

again contrary to law and it has been held in a Mysore case that a suit lies at the instance of a wife to prevent the husband by means of an injunction from marrying a second wife *Shankarappa v. Basamma*.³⁰

Where a marriage is void as repugnant to section 5 (i) an agreement to maintain the woman for which she would not have agreed to marry him is also null and void as one for future cohabitation.³¹

The provision against bigamy in Section 5 (1) does not contravene Article 25 of the Constitution guaranteeing the right to free profession, practice and propagation of religion.³²

2 Unsoundness of mind etc.—Section 5 (ii) requires that at the time of marriage (a) neither party to the marriage is incapable of giving a valid consent to it by reason of unsoundness of mind which, in the context would mean lack of capacity to understand one's affairs or marital obligations, or (b) neither party though capable of giving a valid consent is suffering from mental disorder of a kind and to an extent as would render the party unfit for marriage and the procreation of children, or (c) neither party has been subject to recurrent attacks of insanity or epilepsy. Unsoundness of mind may be due to idiosyncrasy or insanity, permanent or temporary. The prime question to be answered in connection with the validity or otherwise of a marriage alleged to have been contracted between persons either of whom is said to be an idiot or insane person is the question whether that particular person is in a position to comprehend and appreciate the significance of the marriage and its effect, and obligations on his status and condition in society. If the answer is in the affirmative, the marriage cannot be impugned as invalid. If the answer is in the negative, the marriage is voidable under section 12 (2) (b). See also the definition of a lunatic under Section 3 (5) of the Lunacy Act and *Anima Roy v. Probodh*.³³

"Subject to recurrent fits of insanity" has been construed to mean "subject to an increase of the acuteness or severity of unsoundness of mind recurring periodically in its course."³⁴ The term "epilepsy" signifies a disorder of the central nervous system, characterised by recurring explosive nerve cell discharges and manifested by transient episodes of unconsciousness or psychic disfunction with or without convulsive movements.³⁵

3 Age of the persons to be married—Section 5 (iii) now requires that at the time of the marriage, the bridegroom must have completed the age of twentyone years and the bride the age of eighteen years. But it does not render nor is there any other provision in the Act which renders void or voidable a marriage violative of this clause.³⁶ The Andhra

(30) 1964 Mys. 247

(31) *Tala Devi v. Brundaban Mantham*, (1971) 1 G.W.R. 297

(32) *Ram Prasad v. State of U.P.*, 1961 All 334, *G. Sambas Reddy v. G. Jayamma*, 1972 A.P. 156 (F.B.).

(33) 1969 Cal. 304.

(34) *Smith v. Smith*, (1940) 2 All E.R. 595

(35) See Blackston's New Gould Medical Dictionary.

(36) *Narain v. Narain*, 1963 H.P. 15; *Prem v. Dayaram*, 1965 H.P. 15, *Mohinder Kaur v. Major Singh*, 1972 P & H 184, *Datta v. Manitra*, 1976 Cr.L.J. 1221, *Gundan v. Baralal*, 1976 M.P. 83. Cf. *Durjodhan v. Bangapeti Devi*, 1977 Orissa 36. [Spouses punishable under S. 18 but marriage will continue to be valid in law and enforceable in Court].

Pradesh High Court held in some cases³⁷ that such a marriage is void *ab initio* but a Full Bench decision of that High Court has overruled these cases.³⁸ According to the Full Bench, the consequence of marrying in contravention of Section 5 (iii) is that the persons concerned are liable for punishment under Section 18 and further, if the requirements of Section 13 (2) (iv) as inserted by the Marriage Laws (Amendment) Act of 1976 are satisfied, at the instance of the bride a decree for divorce can be granted. Barring these two consequences, one arising under Section 18 and the other arising under Section 13 (2) after the enactment of the Marriage Laws (Amendment) Act, 1976 there is no other consequence whatever resulting from the contravention of Section 5 (iii). A marriage in violation of Section 5 (iii) not being a nullity it cannot be pleaded in defence to a petition for restitution of conjugal rights.³⁹

Under Section 13 (2) (iv) in case the bride was below 15 at the time of marriage and she has repudiated the marriage after attaining that age and before she completed 18, she can obtain divorce. This provision would suggest that the marriage before fifteen years may be regarded as voidable.

Under Section 18 any one who procures a marriage of himself or herself in contravention of Section 5 (iii) is punishable with simple imprisonment which may extend to 15 days or with fine up to Rs. 1000 or with both.

4. Prohibited degrees—The range of prohibited degrees and the effect of marriage within the prohibited degrees have already been discussed under Section 3 (g). What is to be remembered on this matter is that there are customs which are saved which permit of such marriages. The custom relied upon must fulfil the requirements of a valid custom indicated in Section 3 (a). One instance prior to 1955 and two after 1955 showing marriage between parties within the degrees of prohibited relationship in the Dravida Brahmin community would be insufficient to make out a custom relaxing the condition imposed by Section 5 (iv).⁴⁰ Example of a custom falling within the relaxation allowed by that clause is that permitting marriage with the maternal uncle's daughter in South India.⁴¹ Such legalising custom or usage must be observed by the community or class or group of both the parties, and the fact that a marriage within the prohibited degrees is allowed according to the custom or usage obtaining among the community of one of the parties to the marriage alone, will not make the marriage valid. Another thing to be remembered is that a marriage within the prohibited degrees is void and not merely voidable and either party to such a marriage can ignore that marriage and contract another lawful marriage without being guilty of bigamy under Section 17 of the Act. Under Section 18 every person who procures a marriage of himself or herself to be solemnised in contravention of clause (iv) is liable to be punished under Section 18 (b).

5. Sapinda relationship—What has been said about the marriages within prohibited degrees also applies to a marriage within the sapinda relationship both with reference to the nullity of the alliance and the nature of the custom to the contrary which is saved under

(37) *Suramma v. Gangath*, 1975 A.P. 193, *Palanisetti v. Srinamulu*, 1968 A.P. 375. See also *Krishni Devi v. Tulam Devi*, 1978 P. & H. 305.

(38) *Venkateswara v. State*, 1977 A.P. 43 (F.B.).

(39) *Mahender Kaur v. Major Singh*, 1971 P. & H. 174.

(40) *Kamakshi v. Menji*, (1970) 2 M.L.J. 477.

(41) *Venkata v. Subhadra*, I.L.R. 7 Mad. 548, 549.

this section. Under Section 18 a marriage in contravention of Section 5 (v) will render the parties liable to punishment under Section 18 (b).

6. *Clause (v).*—Prior to the omission of clause (v) by the Child Marriage Restraint (Amendment) Act of 1978, Section 6 and Schedule, that clause had provided that where the bride had not completed the age of 18 years at the time of marriage the consent of her guardian in marriage was necessary. Contravention of the clause was punishable with fine which may extend to Rs. 1000 under Section 18 (a). Since at the present time both parties must have completed 18 years at the time of marriage under Section 5 (iii) the question of guardian's consent will not be material. But it may well be and often it happens that the bride is below 18 at the time of marriage. The marriage in such a case is neither void nor voidable.⁴² If however, the consent of the girl or her guardian had been obtained to the marriage by force or fraud the marriage will be voidable under Section 12 (1) (c).

6. Guardianship in marriage. [* * * * *]

Guardianship in marriage.—[Since now under Section 5 (iii) both parties to a marriage would have completed 18 years of age at the time of the marriage, the question of guardianship in marriage under the Act has ceased to be material. But even now girls are often married before 18 years at the time of marriage. Consent of guardian may, in such cases, be needed. There is however no express authority, in the Hindu Law texts making the guardian's consent a condition precedent to the validity of the marriage [*see Khushal Chand v. Bai Moni*,⁴³] Prior to its omission by Act II of 1978 section 6 had provided:

(1) Wherever the consent of a guardian in marriage is necessary for a bride under this Act the persons entitled to give such consent shall be the following in the order specified hereunder, namely:

- (a) the father,
- (b) the mother;
- (c) the paternal grandfather;
- (d) the paternal grandmother,
- (e) the brother by full blood; as between brothers the elder being preferred,
- (f) the brother by half blood; as between brothers by half blood the elder being preferred.

Provided that the bride is living with him and is being brought up by him;

- (g) the paternal uncle by full blood; as between paternal uncles the elder being preferred;
- (h) the paternal uncle by half blood; as between paternal uncles by half blood the elder being preferred.

Provided that the bride is living with him and his being brought up by him,

- (i) the maternal grandfather;
- (j) the maternal grandmother;
- (k) the maternal uncle by full blood, as between maternal uncles the elder being preferred:

(42) See *Shrinand v. Bhagwatiamma*, 1962 Mad. 400; *Pranj v. Deyman*, 1965 F. & H. 15.

* Omitted by the Child Marriage Restraint (Amendment) Act, 1978, S. 6 and Schedule.

(43) I.L.R. 11 Bom. 247

Provided that the bride is living with him and is being brought up by him.

(2) No person shall be entitled to act as a guardian in marriage under the provisions of this section unless such person has himself completed his or her twenty-first year.

(3) Where any person entitled to be the guardian in marriage under the foregoing provisions refuses, or is for any cause unable or unfit, to act as such, the person next in order shall be entitled to be the guardian.

(4) In the absence of any such person as is referred to in sub-section (1), the consent of a guardian shall not be necessary for a marriage under this Act.

(5) Nothing in this Act shall affect the jurisdiction of a Court to prohibit by injunction an intended marriage, if in the interests of the bride for whose marriage consent is required, the Court thinks it necessary to do so.

In view of the deletion of the above provision, the question of guardianship in marriage where the bride is below 18 years will fall to be regulated by the *sastric* Hindu Law.

A noteworthy provision in the former Section 6 was that in sub-section (5) which stated that nothing in the Act shall affect the jurisdiction of the Court to prohibit by injunction an intended marriage, if in the interest of the bride for whose marriage consent was required, the Court thought it necessary to do so.⁴⁴ This presupposed that the bride was a minor and the marriage intended for her had been decided upon with or without the consent of the guardian for the marriage. The jurisdiction envisaged is the jurisdiction of the Court as the supervisory authority to see that the interest of the minor does not suffer by the imprudence of the minor or her guardian. If the marriage intended is not in the interest of the minor, it is open to anybody interested in the minor to move the Court for the necessary injunction against the solemnization of the marriage even in a case where the consent of the guardian for the marriage has been obtained. It will be *a fortiori* if the consent of such guardian had not been obtained. It must be remembered that the marriage performed without the consent of the minor bride or the consent of her guardian for the marriage is not void, and the mere fact that the requisite consent is not obtained is no ground for the Court's interposition by injunction. Unless the Court thinks that such intervention is necessary in the interest of the minor girl, it will not interfere either on the ground that the requisite consent has not been obtained or on the ground that a person who is not a guardian for the marriage is trying to bring about the marriage.

7. *Ceremonies for a Hindu marriage.*—(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the *Saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

(44) See also *Umashankar v. Radha Devi*, 1967 Pat. 220.

Section 7—Synopses.

- | | |
|-----------------------------------|----------------------|
| 1. Hindu marriage. | 3 Saptapadi |
| 2 Customary rites and ceremonies. | 4. Madras amendment. |

1. Hindu marriage—While section 5 lays down the conditions for a Hindu marriage, Section 7 deals with the ceremonies for a Hindu marriage. The expression "Hindu marriage" no doubt embraces all marriages to which either party is a Hindu, a Sikh, a Jain or a Buddhist; but then for such marriage to be valid, the tenets of each religion have to be kept in view so that a marriage would be valid only if the ceremony through which it is solemnised is sanctioned by the religion of either party as a customary ceremony⁴⁵. Since the Buddhists are treated as a class different from Hindus, if the parties had not converted themselves into Buddhism at the time of marriage, in the absence of proof of the Buddhist form of marriage having been recognised as a custom in the particular caste to which the parties belong, their marriage according to the Buddhist rites cannot be treated as a valid marriage⁴⁶.

2 Customary rites and ceremonies—The Act still contemplates ceremonial marriages and does not validate a marriage without any ceremony whatsoever. Almost every civilised society prescribes the forms and ceremonies of marriage, and no marriage can be held valid under the Act unless some ceremony has been gone through. Subsection (1) provides that such ceremony must be the ceremony observed by either party to the marriage. If the rites and ceremonies of marriage are the same in the communities of both the parties, those ceremonies will be necessary and sufficient to make the marriage valid. If the ceremonies of the community of one of the spouses are different from the ceremonies of the community of the other spouse, then the ceremonies of either community should be gone through. There is no preference shown to the ceremonies in the community of the bridegroom as against the ceremonies observed in the community of the bride, with the result that a marriage celebrated with the rites and ceremonies observed in the community of the bride will be quite as valid as a marriage celebrated with the rites and ceremonies in vogue in the community of the husband. When is the marriage complete and what is the final rite or ceremony which marks the completion of the marriage, when it can be said to have become final and irrevocable, should be determined with reference to the consciousness of the community whose rites and ceremonies have been observed.

The performance of the homa, an oblation in the sacred fire, the panigrahana or taking hold of the bride's hand by the bridegroom and circumambulating the sacred fire to the chant of vedic mantras, the treading on the stone and the saptapadi, the seven steps by the couple jointly before the sacred fire are the principal rites for a Hindu marriage according to the Asvalayana Grihyasutra. Under section 3 (1) however a Hindu marriage may be completed by ceremonies other than the above when sanctioned by custom. Merely going through ceremonies with the intention that the parties be taken to have been married will not make them ceremonies prescribed by law or approved by custom.⁴⁷

3 Saptapadi—Where the ceremonies observed at a marriage include the sastric ceremony of saptapadi, the marriage must be considered to have become final on the seventh

(45) *Rasender Kumar v. Kamal Kanda*, 1975 Rev. L.R. 347.

(46) *Shakuntala v. Nilkanth*, 1971 Mah. L.J. 310.

(47) *Bhauroo v. State of Maharashtra*, 1965 S.C. 1584.

step being taken jointly by the bridal pair. Invocation before the sacred fire and, *saptapadi* are essential ceremonies for marriage whether in the *Brahma* or *Asura* form. Mere tying of *thali* is not enough to establish that a marriage had been solemnised.⁴⁸ If the ceremonies of either party do not include *saptapadi*, then any other ceremony which according to the custom of the community gives the binding finality to the marriage has to be performed, and if performed, the marriage becomes final and binding on the parties to the marriage and on everybody else. Marriages celebrated without the performance of the homam and *sap'apadi* are valid in the Reddi community of the Telengana area, *Dolgothi Raghu Reddi*, in re,⁴⁹ *Rabindranath v. State*.⁵⁰

4. **Madras amendment.**—Under Tamil Nadu Act (XXI of 1967) inserting Section 7-A in the Parent Act, a marriage solemnised between two Hindus in the presence of relatives, friends or other persons (a) by each party to the marriage declaring in any language understood by the parties that each takes the other to be his wife or, as the case may be, her husband; or (b) by each party to the marriage garlanding the other or putting a ring upon any finger of the other; or (c) by the tying of the *thali* after the commencement of the Hindu Marriage (Tamil Nadu Amendment) Act, shall be good and valid in law. The effect of the section is to validate with retrospective effect marriage between two Hindus by the tying of *thali*.⁵¹

8. **Registration of Hindu marriages.**—(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.⁵²

(2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu Marriage Register shall at all reasonable times be open for inspection and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

(48) *Kanchithapadum v. Dharmasundari*, 1969 Mad. L.W. (Cal) 310.

(49) *Raghuir Kumar v. Shanmuganathan*, (1970) 2 M.L.J. 193: 83 Mad. L.W. 315 [Parties exchanging garlands and bridegroom tying *thali*].

(50) 1967 An. W.R. 294; 1968 A.P. 117.

(51) 1969 Cal. 59.

(52) See Andhra Pradesh Hindu Marriage Registration Rules, 1963; West Bengal Hindu Marriage Registration Rules, 1966; Punjab Hindu Marriage Registration Rules, 1960.

1. *Hindu marriage register.*—On account of the various customary forms of marriage prevailing in diverse communities amongst the Hindus and the difficulty of proving them with any degree of precision, it is necessary that an infallible method of proving the marriage should be provided for and this section serves that purpose. It says that the State Government should frame rules for maintenance of a marriage register in which the particulars of a marriage may be entered by the parties to the marriage in such form and subject to such conditions as may be prescribed. These rules shall be laid before the State Legislature. The State Government may provide for compulsory entry of each marriage taking place in any part of the State or a particular part thereof or in such cases or in all cases as may be prescribed, and if there is a direction for compulsory registration, a contravention of the direction is made punishable by a fine of Rs. 25.

The marriage register is open for inspection at all reasonable hours and shall be admissible as evidence of the statements therein contained. A certified extract shall be given to the applicant on payment of the prescribed fee. The Marriage Register is a public document by virtue of Section 74 of the Evidence Act and a certified copy of the Register or any part thereof issued under Section 76 can be produced in proof of its contents under Section 77 of that Act.

The omission to make the entry in the marriage register shall not make a marriage duly celebrated void. This is a concession made to the sentiment of the orthodox Hindus who do not like to be aligned with the Christians and others whose marriages require registration in the marriage register. In view of the provision in Section 8 (5) even if the State Government makes rules for compulsory registration of marriages, there cannot be a rule invalidating a marriage for want of registration.

Even prior to the Hindu Marriage Act, the then State of Bombay had enacted the Bombay Registration of Marriages Act, 1953, which has not been repealed since then. That Act will apply to Hindu marriages to the extent its provisions are not repugnant to the provisions of the Hindu Marriage Act.

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION

9. *Restitution of conjugal rights.*—“[**]When either the husband or the wife has, without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

[*Explanation.*—Where a question arises whether there has been reasonable excuse for, withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.]

••[• • •]

* Inserted by Act LXVIII of 1976, Section 3.

** Sub-section (2) omitted by *ibid.*

Section 9—Synopsis

- | | |
|--|---|
| 1. Restitution available for either spouse. | 6 Other grounds of defence. |
| 2. Withdrawing from the society of the other | 7 Want of bona fide in the petitioner. |
| 2-a. Matrimonial home. | 7-a. Ours of proof. |
| 3. Reasonable excuse for withdrawal from society. | 8. Form of the decree for restitution of conjugal rights. |
| 4. Unreasonable excuses for withdrawing from the society of the other spouse | 8-a. Mode of execution |
| 5. Court's satisfaction about the truth of the statements in the petition | 9. Decree and subsequent separation. |
| | 9-a. Effect of decree. |
| | 9b. Section 9 and other enactments |

1. **Restitution available for either spouse.**—Suits for restitution of conjugal rights were not contemplated by Hindu Law proper. But such suits have been allowed by the British Indian Courts on the analogy of similar suits in England. To maintain a petition under Section 9 for restitution the other party must have left the petitioner or withdrawn from cohabitation without reasonable excuse⁵³. The Court that can take cognizance of the petition is the District Court as defined in Section 3 (b).⁵⁴ The existence of a separation agreement is no bar to a petition for restitution of conjugal rights.⁵⁵ Deprivation of either spouse of the conjugal company of the other is as much common in the one sex as in the other and is due frequently to trivial as well as grave reasons. In the interest of the institution of marriage on which depends the stability of any civilized State, some safeguards should be provided against too hasty separations and remedies made available for approachment and reconciliation. Either spouse can institute proceedings in Court for directing the other spouse to give back the conjugal society which has been unreasonably withdrawn. In the matter of breaking of conjugal rights, it may happen in a particular case that the petitioner is more guilty than the respondent in the matter of creating causes and circumstances which forced and justified the latter from breaking away from the petitioner's company, and if the Court comes to the conclusion it is so, it will not decree restitution.

Where in a suit for restitution of conjugal rights the validity of the marriage itself is disputed, the Court must find that the necessary rites and ceremonies have been performed without being content merely with a finding that the marriage had taken place; *Kushta Devi v. Kalaram*.⁵⁶ Even where relationship as husband and wife is denied the Court will determine whether there is such relationship and decide whether a decree for restitution should be granted.⁵⁷

2. **Withdrawing from the society of the other.**—In order to sustain a petition for restitution of conjugal rights, it is necessary to establish that the respondent has withdrawn from the society of the petitioner. The society here means conjugal society. Where by the working conditions of the wife and the implied arrangement arrived at between the spouses the wife had taken service in a school, at a certain place and the husband had at all times

(53) See also S. 22, Special Marriage Act, 1954; S. 36, Parsi Marriage and Divorce Act, 1936; Sec. 32 and 33, Indian Divorce Act, 1929.

(54) See also *Sudip Dei v. Madhusudan*, (1971) 2 C.W.R. 586.

(55) *This and Naidu v. Rajammal*, (1967) 2 M.L.J. 484; 80 Mad. L.W. 472.

(56) 1968 Punt. 225.

(57) *Gurukul Kany v. Mahend Singh*, 1967 Punt. 239.

access to the wife and in fact had lived with her at that place there was no virtual withdrawal by the wife from the society of the husband. It is a case of enforced separation necessitated by the service conditions of the wife and, unavailability of service at the place where the husband resided.⁵⁸ Where even at the date of the marriage the wife was in employment far away from the place of residence of the husband and for four years both of them used to live together and cohabit during vacation or holidays and later on she resigned her job and lived with the husband but due to some unhappy developments she again joined service at another place stating that her husband could come and stay with her whenever he chose and she was also prepared to go and reside with her husband where he was serving during vacation and other holidays, it could not be said that the wife had withdrawn from the society of the husband.⁵⁹ Where a husband and wife are living in the same house but occupying different rooms, and the husband never talks to the wife and does not give her his company, though he gives her sufficient funds for her food and clothing and other comforts, the question may arise whether in such circumstances a petition by the wife for restitution of conjugal rights against the husband will lie. It must be remembered that in a petition for restitution of conjugal rights the prayer is that the other party thereto be ordered to return to or to receive the petitioner and to render conjugal rights. These rights include what is known as consortium in which is implicit what may be called matrimonial cohabitation which may or may not include matrimonial intercourse depending upon the age of the parties and their health and inclinations. In *Wily v Wily*,⁶⁰ an offer by the husband to live under the same roof with his wife, each party being free from molestation by the other was held not an offer of matrimonial cohabitation. Hence before the question posed can be answered one way or the other, the circumstances necessitating such attitude on the part of the husband should be investigated, and if it is found that there is absolutely no justification for the husband to treat the wife in the way above-mentioned, the case will be one where the petition by the wife should be allowed. But normally withdrawing from one's society connotes separation and going away and living elsewhere with the intention not to come back. Mere temporary withdrawal by the wife from the society of the husband did not amount to withdrawal from the society of the husband when she had no animus to withdraw permanently from such society.⁶¹ Nor can the question of the wife withdrawing herself from the husband arise where the spouses had not been able to decide where the matrimonial home should be set up.⁶²

Where in an application by the husband the wife raises the defence of desertion by the husband by going away to another place and the husband proves that even before his going away the wife refused to join him for establishing a home, the defence of the wife should not be entertained and upheld: *Sakuntalabai v. Baburao*.⁶³ See also *Tulsa v. Pannalal*.⁶⁴

2 a. **Matrimonial home.**—The main objectives of a Hindu marriage were *praja* (begetting of male progeny to cater to spiritual needs) and *dharma-sampatti* (discharging

(58) *Pravinjan v. Surekhabai*, 1975 Guj. 69.

(59) *Mirekmal v. Dori Bai*, 1977 Raj 113, 116.

(60) (1918) P. 1. Cl., *Weatherly v. Weatherly*, (1947) 1 All E.R. 563. [So long as cohabitation subsisted mere refusal of sexual intercourse by one of the spouses would not amount to withdrawal from cohabitation without cause.]

(61) *Ramachandrase v. Premloka*, 1979 M.P. 15, *Ratnaprekhabai v. Sheikrao*, 1972 Bom. 182.

(62) *Garg v. Garg*, 1978 Delhi 256, 308.

(63) 1963 M.P. 10.

(64) 1963 M.P. 5.

duties of *dharma* including social responsibilities). Where the wife was, that was the matrimonial home. A Hindu wife on marriage passed into her husband's family. The relationship between the spouses imposed a duty on the husband to protect his wife, to give her a home, to provide her with comforts and necessities of life. It enjoined on the wife the duty of attendance, obedience to the husband and to live with him wherever he chose to reside.⁶⁵ Even today this duty is as much a rule as it ever was.⁶⁶ In early times the husband was the breadwinner; the wife stayed at home. Therefore the husband decided the *locus* of the matrimonial home; the wife had little or no voice in it. Social and economic life of the Hindus has however undergone changes with the passage of time. A wife may have to live by herself while the husband is, living at a place where he cannot take his wife with him. Again the husband may not always be the only or even the chief bread-winner of the family; the wife also may have had to take employment at another place and may earn even more than the husband. Or it may be that the husband is without a job and the wife alone is the earning member. Yet again there may arise cases of women having a child or children by an earlier marriage while being employed and contracting a second marriage. In situations like these questions such as the husband's right to insist on the wife giving up her job and stay with him and the wife's right to participate in the choice of a matrimonial home have come up before the Courts. The decision in *Kailash Wati v. Ayndhia Parkash*⁶⁷ seems to hold that even in such situations the husband has a right to decide that the matrimonial home must be at the place where he happens to reside and the wife should resign her job and come to live with him there. *Sujit Kaur v. Ujjal Singh*⁶⁸ suggests that on general principles, the husband acting *bona fide* is entitled in law to determine the locus of the matrimonial home in such cases. In *Shanti Nigam v. Nimesh Chandr. Nigam*⁶⁹ it is held that where a wife feels that it is necessary for her own upkeep and the bringing up of her children that she should work, the decisive voice must be her own and if there is disagreement on the point between the spouses the husband cannot compel her to take a different line and the Court cannot grant restitution of conjugal rights in his favour. A decision of the Delhi High Court, in *Garg v. Garg*⁷⁰ has, following the analogies of English law, adopted a modernistic approach to these questions and held that if the *dharma* *sastras* preached that the wife should always submit to the husband whatever the financial circumstances of each of them that was only an ideal aimed at by the authors, that the husband's right to choose the matrimonial home is not absolute that though he has a casting vote in case of difference of opinion between the spouses it should be used only as a tie-breaker, that the basic principles on which the location of the matrimonial home is to be determined are based on the common conveniences of the spouses and balance of circumstances, that the principle that the wife is not entitled to separate residence and maintenance except for justification and otherwise the spouses are expected to live together in the matrimonial home is only where the wife depends on the husband financially. Where the circumstances

(65) *Srinider Kaur v. Gurdeep Singh*, 1973 F. & H. 134. See also *Pethuraju v. Raghu*, 1965 A.P. 467; *Radhakrishnan v. Dhanaalakshmi*, 1975 Mad. 531; (1975) 1 M.L.J. 439.

(66) *Susila Devi v. Madhurasen Kisan*, (1976) 42 Out. L.T. 725.

(67) 1977 Hindu L.R. 175 (F.B.).

(68) (1978) 80 Punj. L.R. 698.

(69) (1971) All. L.J. 67; see also *Mithranal v. Doli Bai*, 1977 Raj. 113; *Pratibha v. Sureshbabu*, 1978 Guj. 69; *Radhakrishnan v. Dhanaalakshmi*, *supra*.

(70) 1978 Delhi 236.

are equally balanced in favour of the wife and the husband, then there would be a stalemate and neither of them would be able to sue the other for restitution of conjugal rights.⁶⁹ It was also held that there was no warrant in Hindu Law to regard the wife as having no say in choosing the place of matrimonial home and that any law which would give the exclusive right to the husband to decide upon the place of the matrimonial home without considering the merits of the claim of the wife would be contrary to Article 14 of the Constitution and unconstitutional for that reason. The Delhi decision overlooks the fact that the Hindu marriage is still not wholly secular and carries much religious significance. Relaxation of the ancient rule needed in the case of working wives who are better situated than their husbands to choose the place of the matrimonial home does not call for a repudiation of the rule itself. The concepts of protection of the husband are not inelastic and rigid which cannot be moulded in the context of present day conditions and needs of the society.⁷¹ Nor is it useful to invoke the analogies of English law in this matter in view of the differences in the conditions and culture of this country.⁷²

The question of matrimonial home involves also the subject of relation between the relatives of the spouses. It is observed in American Jurisprudence, Vol. 17, p. 203: "In considering the question as to how far one spouse is justified in leaving the marital abode on account of the conduct of the other's relatives living in the house, the Courts have naturally refrained from attempting to formulate a rule of general application; each case is determined largely upon its own particular circumstances. As a general proposition, the power of determining who shall be the inmates of the home rests primarily in the husband in correlation to his duty to make provision for the wife, but he must exercise this right in a reasonable manner. The law does not permit him to act arbitrarily in compelling his wife to live with or in close proximity to his relatives, or on the other hand permit him without reason to exclude his wife's relatives from the home or forbid her social intercourse with them." These observations would apply equally to Hindu spouses. To a similar effect are the observations in the case of *Rasikanlal v. Basant Kumar*⁷³, where it is pointed out that generally speaking the husband being the wage earner has the right to say where he would keep his wife, though this does not mean that the wife has absolutely no say in the matter. Like all reasonable people both parties should amicably decide as to the place of their joint residence, whether in the parental house of the husband or in a separate residence. If either of them assumes an unreasonable stand which necessarily results in separation between the spouses, it would be that party that should be condemned as guilty of desertion.

3. **Reasonable excuse for withdrawal from society.**—A petition for restitution of conjugal rights is not maintainable on the ground of withdrawal from the society of the petitioner unless it is shown that the withdrawal is without reasonable excuse. Appropos the term "excuse" it has been observed: "The word 'excuse' appears to have been advisedly used. It is something less than 'justification' and something more than a mere whim, fad, or brain-wave of the respondent. It is a fact which has to be determined with reference to the

⁶⁹Such a position would afford ground for divorce in England under Section 1 of the Matrimonial Causes Act, 1973.

(71) *Mirajamal v. Dasi Bai*, 1977 Raj. 113, 116.

(72) See *Sushila Devi v. Madhupratap Kler*, (1970) 42 Cut. L.T. 725.

(73) (1967) 69 Punj. L.R. 509.

respondent's state of mind in the particular circumstances of each case⁷⁴. If the Court comes to the conclusion that there are reasonable grounds for the withdrawal and that the respondent is justified in living away, such justification being due to the misconduct or other circumstances for which the petitioner is responsible, the petition will be dismissed in the exercise of the discretion of the Court under this section read with Section 23 (*Mst. Gorden v. Sarwan Singh*).⁷⁵ The acid test is to find out whether the conduct of the petitioner has been such as to render it practically impossible for the spouses to live properly together and for the duties of the married life to be discharged. No doubt the cause must be serious and grave and the onus of proving such cause is on the party asserting it.

In addition to grounds for judicial separation, nullity of marriage or divorce, the following have been recognised by the decisions to be valid grounds for separate living disentitling the other spouse to a decree for restitution of conjugal rights:

- (a) Grossly indecent behaviour;
- (b) Extravagance of living on the part of the wife affecting the financial position and prospects of the husband;⁷⁶
- (c) Excessive drinking carried to such a degree as to render it impossible for the duties of married life to be discharged;
- (d) Persistence in a false charge against the respondent of having committed an unnatural offence;
- (e) Refusal of marital intercourse without sufficient reason;⁷⁷
- (f) Apprehension of violence due to development of insanity in the petitioner;
- (g) Agreement to live separate;⁷⁸
- (h) Misconduct approaching cruelty but falling short of it;⁷⁹
- (i) Imputation of unchastity persisted in by the husband;⁸⁰
- (j) Cruelty;⁸¹
- (g) Financial difficulty of husband and comfortable position of wife in employment at another place;⁸²

⁷⁴ *Sadhuram v. Jagdish Kaur*, 1969 P. & H. 139. Cf., *Krishnamurthy v. Sumanthakumari*, (1976) 2 Kwn 361 ["reasonable excuse" should be understood in the ordinary sense"]

⁷⁵ 1959 Punj. 162.

⁷⁶ *G. v. G.*, 1930 F. 82.

⁷⁷ *Davis v. Davis*, 1918 P. 85; Cf., *Jagdish Lal v. Shyama Motilal*, 1956 All. 1506 [husband's impotency.]

⁷⁸ *Ch. Chinnayyammal v. Manjeyan*, 1976 Mad. 178.

⁷⁹ *Mst. Gorden v. Sarwan Singh*, 1959 Punj. 162. See also *Shanti Devi v. Bapji Singh*, 1971 Delhi 294; *Krishnamurthy v. Sumanthakumari*, supra.

⁸⁰ *Sera Abraham v. Pili Abraham*, 1959 Ker. 73; *Prasad v. Durgaram*, 1965 Hlo P. 15; *Kayam Lado v. Kampta Prasad*, 1965 All. 280; *Ratna v. Sankaran*, 1967 Mys. 166; *Bejra Das v. Abha Jem*, 1969 Cal. 477 [mental cruelty by calling wife a whore]; see also *Sumanth v. Anandram*, 1976 Bom. 212; *Sushil Kumar v. Prem Kumar*, 1976 Bom. 321; *Karnal Singh v. Bhupinder Kaur*, 1973 P. & H. 19.

⁸¹ *Mithalingappa v. Sat. Lakshminamma*, 1968 Mys. 113; *Dalit Singh v. Premjit Kaur*, 1971 Ont. L.J. 684; *Prasanna v. Raghunatha*, 1976 (2) Q.W.R. 930 [wife being compelled to stay in parents-in-law's house against her wishes under adverse circumstances]; *Anand Kumar v. Sumanth*, (1976) 90 Punj. L.J. 573.

⁸² *Garg v. Garg*, 1978 Delhi 296; *Radhakrishnan v. Dharmakrishnan*, (1975) 1 N.L.J. 439; 1975 Mad. 231.

- (h) Husband insisting on wife taking non-vegetarian diet and to drinking habits;⁸⁸
- (i) Husband issuing to wife's father and other relations invitations for another marriage by him;⁸⁹
- (j) Respondent's working necessary for upkeep and bringing up of her children by a previous marriage;⁹⁰
- (k) Husband living with another woman and having sexual relations with her;⁹¹
- (l) Abandonment of wife by petitioner for a long time;⁹²
- (m) Husband's falsely alleging that wife has married again and is living in adultery;⁹³

4. **Unreasonable excuses for withdrawing from the society of the other spouse.**—The following have been held not to be sufficient cause for withdrawing from the society of the other spouse—

- (a) Mere frivolity, levity or even impropriety, falling short of adultery and giving no reasonable ground for belief that it has been committed;
- (b) Mere frailty of temper and habits which are distasteful to the other spouse, even though as the result of neurosis,
- (c) Habits of intemperance even if prolonged and accompanied by untrue accusations and hysterical outbursts,
- (d) Existence of differences on account of the wife's inability to agree with the step-children;
- (e) Discovery of pre-marital misconduct which has not resulted in pregnancy with another man at the time of the marriage;
- (f) Development of insanity after marriage which does not give rise to a reasonable apprehension of violence,
- (g) Agreement between husband and wife to live separately *Tirumal Naidu v Rajammal* ⁹⁴ *Pothuraju v. Radha*,⁹⁵ *Chinna Perumal v Mariyasee*.⁹⁶
- (h) Mere poverty or non-earning condition of the husband *Swinder v. Mohinder Singh*;⁹⁷
- (i) Husband's failure to find independent livelihood for himself and his wife;⁹⁸

(83) *Chand Narain v. Saroj*, 1975 Raj. 88.

(84) *Id.*

(85) *Shanti Nigam v. Ramshankar Nigam*, 1971 All L.J. 67, *Mirchamal v. Devi Bai*, 1977 Raj 113.

(86) *Sarraj v. Abraham*, 1970 Mad. 434.

(87) *Chitli Venkanna v. Mahalakshmi*, (1976) 2 An.W.R. 45; (1976) 1 A.P.L.J. 207. Cf. *Ishwari Devi v. Mathra Das*, 1968 Cur. L.J. 519.

(88) *Mohinder Kaur v. Bhug Ram*, 1979 P. & H 71.

(89) 1968 Mad. 201; (1967) 2 I.L.J. 484; 80 L.W. 412; I.L.R. (1968) 3 Mad. 275.

(90) 1965 A.P. 407.

(91) 1967 Mad. 179.

(92) I.L.R. (1968) 1 Panj. 339.

(93) *Kabir v. Aje Managa*, 1931 Rang. 111.

(j) Non-payment by husband of interim maintenance **

(k) Acceptance by wife of service without husband's consent at a place different from his home, **

(l) Mere consumption of alcohol **.

In *Hardip Singh v. Smt Dalip Kaur*,** it was held that where a husband was justified in refusing to set up a separate house from his parents to satisfy his wife, the refusal cannot be a valid ground for the wife to live separately from the husband and resist the husband's suit for restitution of conjugal rights or claim separately maintenance for herself and the children. Where the residence of aged parents with the husband does not create circumstances grave enough to subvert the wife's right of consortium, the wife has no right to separate residence with the husband away from the parents.** Where the husband was employed as a teacher and his family owned some land and there was nothing to suggest that he was not in a financial position to support his wife, and his demand that his wife should live with him after resigning her job elsewhere was *bona fide*, the wife will be deemed to have withdrawn herself from his society without reasonable cause ** Where the facts showed that the wife was guilty of undermining the atmosphere of matrimonial love and had without reasonable excuse withdrawn from the society of the husband a decree against the wife for restitution of conjugal rights is proper **

5. **Court's satisfaction about the truth of the statements in the petition** — It is necessary before the petition for restitution of conjugal rights is allowed that the Court should be satisfied about the truth of the statements in the petition, and there is no such thing as an automatic decree for default. Neither spouse should be allowed to have a snap judgment against the other ** In the absence of evidence a decree for restitution could not be passed merely on the strength of the statements made in the petition ** Even if the petition is not defended, the Court must be satisfied that the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of relief, that the petition has not been presented with undue delay, and that there is no other legal ground why the relief should not be granted. *See Section 23* The Court cannot grant a decree for restitution merely because the respondent remains absent and does not adduce any evidence to substantiate his stand. There is a duty imposed upon the Court to satisfy itself that the statements made by the petitioner are true and that there are no legal grounds for refusing the application. Even when these conditions are satisfied, it is still in the discretion of the Court whether or not to pass a decree in the circumstances of the particular case. ** Where the

(94) *Gunden v. Borelali*, 1976 M P 83

(95) *Gaya Prasad v. Bhagwati*, 1966 M P 212, *Sunder Kumar v. Gurdesh Singh*, 1973 P & H. 134.

(96) *Chand Narayan v. Saroj*, 1975 Raj. 88

(97) 1970 Punj 284

(98) *Kanishmath v. Parameswara Iyer*, 1974 Ker 124

(99) *Surya Kaur v. Ujjal Singh*, (1978) 80 Punj. L.R. 693.

(100) *Jasvinder Kaur v. Kulwant Singh*, (1975) 80 Punj. L.R. 649.

(101) *Bimla Devi v. Sat Pal Sharma*, (1977) 79 Punj. L.R. 754.

(102) *Kausalya v. Lalchand*, 1972 Raj. 253

(103) *Alopi Das v. Ramphul*, 1962 M P. 211

husband filed a petition for restitution of conjugal rights and the wife pleaded that she had been treated with cruelty and driven out of the house but failed to substantiate her defence of cruelty, it was held that the petition should be granted even though the husband had not satisfactorily explained why the wife had left the husband's house (*Oordip Kaur v. Pratap Singh*).¹⁰⁶

6 Other grounds of defence—It appears obvious from the import of sub-section (1) of Section 9 as well as the provisions of Section 23 that a petition for restitution of conjugal rights can be defeated on other grounds as well, which have been already mentioned. *Annasahib v. Tarabai*,¹⁰⁷ *Mst. Gurdeo Kanwar v. Sarwan Singh*,¹⁰⁸ *Sakuntala Bai v. Babu Rao*,¹⁰⁹ *Mango v. Premchand*.¹¹⁰ See contra in *Smt. Putal Devi v. Gopi Mandgi*.¹¹¹

A plea of the wife in resisting a suit for restitution that the husband had been out-casted and that according to the custom in the 'biradari' the wife was entitled to refuse to go and live with her husband was held to be no valid defence despite the existence of such custom having regard *inter alia* to Section 1 of the Caste Disabilities Removal Act of 1950.¹¹²

Under English law conduct falling short of matrimonial offence can be pleaded in defence to an action for restitution.¹¹³ What was required was that the cause for withdrawal was a 'just cause' or 'reasonable cause' which meant a cause 'grave and weighty'.¹¹⁴

To a petition for restitution of conjugal rights under Section 9, the ground under Section 12 (1) (d) [wife's pregnancy by a third person] cannot be set up in defence after the expiry of a period of one year.¹¹⁵ Where there is no completed act of sodomy but only a request to the wife to participate in the act and her refusal it cannot be pleaded as a defence to the husband's application for restitution of conjugal rights.¹¹⁶

The presence of the first wife is a valid ground of defence available to the second wife under this section read with Section 13 (2) (i). In a suit by the husband for restitution of conjugal rights the fact that the second wife knew at the time of her marriage about the existence of the first wife would not prevent the availability of the statutory defence, *Mst. Deepo v. Khar Singh*.¹¹⁷ Where the marriage itself was brought about by fraudulent misrepresentation by the husband that he was a bachelor it was held that the husband was not entitled to the relief sought by him.¹¹⁸

(104) (1967) 69 Punj. L.R. 603

(105) 1970 M.P. 36.

(106) 1959 Punj. 162

(107) 1963 M.P. 10.

(108) 1962 All. 447

(109) 1963 Pat. 93

(110) *Mohan Lal v. Shanti Devi*, 1964 All. 21.

(111) *Russell v. Russell*, 1895 P. 315; *MacKenzie v. MacKenzie*, 1895 A.C. 384; *Oldroyd v. Oldroyd*, 1896 P. 175; *Thomas v. Thomas*, 1924 P. 194.

(112) *Testman v. Testman*, (1868) L.R. 1 P. & H. 489 at 494.

(113) *Rangaswamy v. Naganama*, (1972) 2 Mys. L.J. 256.

(114) *Renege v. Sureshanna*, 1967 Mys. 165.

(115) 1962 Punj. 183; L.L.R. (1961) 1 Punj. 784.

(116) *Rahmani Anwar v. T.S.R. Chari*, A.I.R. 1935 Mad. 616.

In every suit for restitution of conjugal rights, the subsistence of a valid marriage is to be proved by the petitioner. This is a matter of jurisdiction and the necessity to prove the marriage is not dispensed with merely because the respondent has not in his answer raised the issue as to marriage. If the suit is undefended, the petitioner has to prove further that the respondent's withdrawal from cohabitation was without reasonable cause. If the suit is defended, it is no doubt the duty of the respondent to satisfy the Court why the suit should not be decreed, and the justification for withdrawal of the respondent's society may be shown, if it is a ground which does not come under the express categories of grounds for judicial separation, nullity or divorce, by cross-examining the petitioner. If this right is not given to the respondent, many a spouse will be made to suffer for no fault of his or hers. As Lord Herschell remarked, "It is certain that spouses may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the reprobation of all the right-minded members of the community. Take the case of a husband who has heaped insults on his wife, but has just stopped short at that which the law regards as *scandal* or cruelty, can he when his own misconduct led his wife to separate herself from him come into Court and avowing his misdeeds insist that it is bound to give him a decree of adherence? Might not the Court refuse its aid to one who has so acted and regard his conduct as a bar to his claim to relief?" *McKenzie v. McKenzie*¹¹⁷. Whenever a petitioner comes into Court with a prayer for restitution, it is legitimate for the Court to expect an answer to the question as to why the respondent has deserted the petitioner. Mere bald statement by the petitioner that the respondent has left the petitioner is not going to satisfy anybody. No one does a thing without cause. Why should one of the spouses desert the other thus throwing to the winds the solemn vows of matrimony? There must be some reason. What is that reason? It may not be sufficient to found a relief in judicial separation. It may fall short of it, may still be sufficient as an answer to the suit for restitution of conjugal rights. So the Court will have to go into this question and find out whether the petitioner comes into Court blameless and deserving of every sympathy. If the Court comes to the conclusion that the petitioner was really responsible for the respondent living away, it will dismiss the petition without any compunction.

7. Want of bona fide in the petitioner—In the same way, as misconduct on the part of the petitioner would disentitle her or him to the relief of restitution of conjugal rights, want of good faith and *bona fides* in the petitioner by reason of an ulterior motive inducing the action which is not any desire to resume marital cohabitation, will justify the Court refusing the relief¹¹⁸. The petitioner must show *bona fide* desire on his part to resume matrimonial cohabitation and to perform his duties of matrimonial life. He has to show sincerity in the above direction.¹¹⁹ Matrimonial law ought not to be made the pawn for selfish gains unconnected with matrimonial home in the hands of one spouse to the detriment of the other.

7-A. Onus of proof—In a petition for restitution of conjugal rights the onus is on the petitioner who can succeed only on the strength of his own case and not on the weakness of the defence set up¹²⁰. The petitioner has to satisfy the Court that the other spouse had with-

(117) (1895) A.C. 389.

(118) *Sankaraj v. Anandras*, 1976 Bom. 212.

(119) *Pratibala v. Rabinanath*, 1976 (2) C.W.R. 990.

(120) *Rohani v. Ashit*, 1965 Cal. 162; *Om Puri v. Karan Singh*, 1971 F. & H. 88; *Rameshbabu v. Sridhar*, 2 Bom. 182; 74 Bom. L.R. 434.

drawn from conjugal society without reasonable excuse.¹²¹ The respondent can build an argument on the petitioner's admitted case,¹²² the petitioner, however cannot take advantage of the weakness of the other party.¹²³ Conduct subsequent to withdrawal from conjugal society cannot be used to justify the withdrawal.¹²⁴ Letters between the spouses should be understood in the background in which they are written and not be construed as if they are precedents or statute.¹²⁵ If the petitioner proves withdrawal from conjugal society by the respondent the latter must show reasonable excuse for such withdrawal.¹²⁶

The *Explanation* added to Section 9 (1) by Act LXVIII of 1976 has merely provided for a rule of evidence by laying down the burden of proof in regard to a question whether there has been a reasonable cause for the withdrawal from the society of the petitioning spouse on the party pleading such excuse. The *Explanation* has not altered the scope and ambit of sub-section (1) before its amendment.¹²⁷

8 Form of the decree for restitution of conjugal right—Though the object of a decree for restitution of conjugal rights is the same whether the petitioner is the wife or the husband, there is a slight change in the form of the decree according as the petitioner is the wife or the husband. Thus if the husband is the petitioner the form is that the wife do return and live with the husband and render him conjugal rights, and if the wife is the petitioner the form is that the respondent do take the petitioner home and receive her as his wife and render her conjugal rights.

In *Easwaramma*, In re¹²⁸ it was held that an appeal filed against the decree ordering restitution of conjugal rights under Section 9 (1) of the Act should be numbered as a regular appeal and not as a civil miscellaneous appeal even though the proceeding did not start as a suit by the presentation of a plaint.

8 A. Mode of Execution—Though a decree for restitution of conjugal rights may be passed against a wife it is not now-a-days enforced by the Court. Non-compliance with the decree will be a good answer to an application under the Criminal Procedure Code for maintenance.¹²⁹ In case the husband had failed to comply with an order for costs and interim maintenance and while in default he applied for stay of the petition the Court would not grant stay where reason for such failure was not satisfactory.¹³⁰

(121) *Kaushalya v. Lal Chand*, 1972 Raj 253

(122) *Sushil Kumari v. Prem Kumar*, 1976 Delhi 324

(123) *Sadhu Singh v. Jagadish Kumar*, 1969 Punj 169; *Gurdip Kaur v. Sarwan Singh*, 1959 Punj 162, *Mango v. Frenchand*, 1952 All. 447, *Kanna v. Krishnaswami*, 1972 Mad 247

(124) *Surinder Kaur v. Gurdip Singh*, 1973 P & H 134.

(125) *Manjula v. Zaverlal*, 1975 Guj 158

(126) *Ibid*

(127) *Krishnamurthy v. Syamantakumaram*, (1976) 4 K. J. 501

(128) 1959 Andh. L.T. 573

(129) *Mahta v. Aye Masu*

(130) *Leavis v. Leavis*, 1971 1 All. 150 (Cand.) (1976) M. 88 [non-payment not reasonable cause for withdrawal from society]

9 Decree and subsequent separation—Where the decree for restitution of conjugal rights has been satisfied by the parties coming together and living as husband and wife, the fact that subsequently one of the spouses has withdrawn his or her company from the other without reasonable excuse is no ground for executing the former decree which had been satisfied but the remedy is to institute another suit for restitution of conjugal rights.

9-A Effect of decree—The Hindu Marriage Act is a special Act which has provided a special forum for dealing with matrimonial causes and for payment of maintenance *pendente lite*, a decision in such petition will be a judgment *in rem*, in view of the special jurisdiction conferred on the special Court under the Act and in view of the judgment rendered by it being a judgment *in rem*, any prayer for a decision on the right to get maintenance in an ordinary civil Court will have no effect in the face of the decision rendered by the Court under the Act and the special Court can restrain the proceedings in the civil Court.¹³¹ Where a decree has been granted in favour of the wife for restitution of conjugal rights, the Court can grant permanent alimony to her under Section 25 without filing a suit for maintenance under the Hindu Adoptions and Maintenance Act.¹³²

Where on a decree for restitution of conjugal rights being passed the respondent returned to the petitioner's house but subsequently again deserted the petitioner, the latter can file a second petition for restitution of conjugal rights. The second petition will not be barred as the second withdrawal from cohabitation gives rise to a fresh cause of action.¹³³

The policy of the law is not to encourage utilisation of a decree for restitution of conjugal rights for *malafide* purposes. The Court cannot be used as a place to which a party to a marriage could come whenever it suited him or her, having meanwhile held the weapon of redress over the head of the other spouse.¹³⁴

9-B Section 9 and other enactments.—(i) There is no prohibition either in the Hindu Marriage Act or in the Arbitration Act against a right to obtain a decree for restitution of conjugal rights etc., from being referred to arbitration under Section 21 of the Arbitration Act. This right can be enforced through Court like any other right which has its origin in common law or is conferred by statute.¹³⁵

(ii) Proceedings for maintenance under the Criminal Procedure Code are independent and of a summary nature. The mere pendency of a civil litigation much after institution of proceedings under the Code is no bar to the continuance of such proceedings.¹³⁶

(iii) In an application for restitution of conjugal rights under Section 9 of the Hindu Marriage Act by the husband the burden lies on him to prove that the wife's withdrawal from his society was without reasonable cause, whereas in a suit by the wife for maintenance under Section 2 of the Hindu Married Woman's Right to Separate Residence and Maintenance Act the wife has to prove justification for withdrawal from the husband's society. Where the suit

(131) *Dr H T. Venna Reddy v Kistamma*, (1973) 1 M.L.J. 300.

(132) *Sengaram v. Phooti*, 1972 Raj. 313.

(133) *Kashadai v Bai Parashiban* 1 L.R. 18 Bom. 327.

(134) *Jameel Singh v. Curnam Kaur*, 1975 P & H, 225.

(135) *Chakravarti Sin h v. Vidya Devi*, 1975 All L.J. 406.

(136) *Josephs E v. Mst. Bina*, 1976 Kesh. L.J. 343.

and the petition are heard together Section 9 throws an initial burden on the husband which is very light since the spouses are always supposed to live together and if he or she lives separately it is for that person to prove the conditions which have necessitated such a course to be taken. Thereafter the burden would shift to the wife or husband as the case may be to show that he or she has withdrawn from the society of the other for a reasonable excuse.¹²⁷

(v) The provisions of the Hindu Adoptions and Maintenance Act, 1956 are not controlled by the Hindu Marriage Act. Under Section 18 of the former Act, a Hindu wife, in certain contingencies can live separately under sub-section (2) of that section without forfeiting her claim to maintenance under clauses (a) to (f). While these clauses touch similar provisions under the Hindu Marriage Act, clause (g) 'if there is any other cause justifying her living separately' is wider in ambit.¹²⁸

10. Judicial separation.—(1) [Either party to a marriage, whether solemnized before or after the commencement of this Act may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.]

(2) Where a decree for judicial separation has been passed, it shall, no longer, be obligatory for the petitioner to cohabit with the respondent, but the Court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

Section—10—Synopsis.

- | | |
|--------------------------------------|-------------------------------------|
| 1. What is judicial separation | 3. Grounds for judicial separation |
| 2. Scope of enquiry and perspectives | 4. Section 10 and other enactments. |

Note—As the grounds for judicial separation are, since the Marriage Laws (Amendment) Act of 1976 the same as those for divorce, for detailed information and comments, see Notes under Section 13.

1. What is judicial separation.—The effect of judicial separation is merely the suspension of active marital life and the obligation of the petitioner to cohabit with the respondent. After a decree for judicial separation it is no longer obligatory for the petitioner to cohabit with the respondent [Section 10 (2)]. Nor does it in any way impair or nullify the marriage tie, for instance it does not enable either to contract another alliance without attracting the penalty provided for such conduct by law. Either spouse cannot marry another and neither can be free with the sex-life and commit adultery without being liable to the penalties and the consequences prescribed. Thus if either spouse during the period of judicial separation commits adultery, that will be a ground for divorce at the instance of the other spouse. *A fortiori*, if either spouse marries during that period, he or she will be guilty of bigamy and will be liable to the punishment prescribed by Section 17 of this Act. The Court has power to rescind the decree on the application of one of the parties. The Act does not refer to any specific grounds on which the decree can be annulled or rescinded. Under Section 10 (2) the Court should consider it just and reasonable to do so. The order cannot be rescinded merely by a spouse saying that he or she is willing

(127) *Saranya v. Parikh*, (1975) 1 A.P.L.J. 282.

(128) *Venkatarama Rao v. Gangabai*, 1976 Am. L.T. 73

*Substituted by Act LXVIII of 1976, Section 4 for sub-section (1),

to rejoin and live with the other spouse. The power should be exercised with great circumspection.¹³⁹ The power to rescind should be so used only to achieve the purpose of giving every opportunity to the parties for reconciliation. The burden of proof of cause for rescission is on the applicant.¹⁴⁰ If the separated spouses living apart under a decree of judicial separation wish to come together and resume their normal married life it is not necessary for them to again undergo the ceremony of marriage because their original marriage still subsists in spite of the decree for judicial separation. If there is no reconciliation between the parties, they are enabled under Section 13 to get an order dissolving the marriage.¹⁴¹

2 Scope of enquiry and perspectives.—In a petition for judicial separation under Section 10 the Court has to deal not with an ideal husband and an ideal wife, but with the particular man and woman before it. The ideal couple or a near ideal one may not have occasion to go to a matrimonial Court, for even if they are not able to drown their differences their ideal attitudes may help them overlook or gloss over mutual faults and failures. The only rider is the rider in Section 23 (1) that the relief prayed for can be decreed only if the Court is satisfied that the petitioner is not in any way taking advantage of his own wrong.¹⁴² Section 10 does not require the standard of 'proof beyond reasonable doubt' observed in criminal cases. It is enough if the Court is satisfied on a preponderance of probabilities.¹⁴³ Even a judicial personage must move with the times. To judge a matter as this of the mid-twentieth century in the light of the rigid conventions of the mid-Victorian era will be to misjudge the whole thing.¹⁴⁴ In the field of matrimonial relationship a purely mechanistic and formal approach is not desirable. There should be a broad perspective. If there is a danger that a decree for judicial separation may bring about some manner of rupture in the relationship which prevails between the parents and their issue such a decree should not be granted where the spouses have lived together for a long time.¹⁴⁵ The passing of a decree for judicial separation on the statements of the parties without the Court giving any finding is against the provisions of the Act and is invalid.¹⁴⁶

3 Grounds for judicial separation.—Inasmuch as the grounds for judicial separation under this section and divorce under Section 13 are practically the same after the Marriage Laws (Amendment) Act (LXVIII of 1976). See Notes under Section 13. The present Section 10 (1) substituted in the parent Act by the Marriage Laws (Amendment) Act of 1976 provides for judicial separation on any of the grounds for divorce specified in Section 13 (1) and (2). The only point of difference is that while the proceeding under Section 13 is subject to the provisions of Section 14, a proceeding under Section 10 is not so subject. Under Section 39 (2) of the Marriage Laws (Amendment) Act of 1976, in pending petition or proceeding an opportunity must be given to amend for converting a petition or proceeding for judicial separation into a petition or proceeding for divorce.

(139) *Narasimha Bhandary v. Vijaya Bai*, 1978 Kan1, 115.

(140) *Godabai v. Jagaji*, 1973 M.P. 4.

(141) *Kushikannan v. Malu*, 1973 Ker. L.T. 431.

(142) *Dr. N.G. Dasgupta v. Mrs. S. Dasgupta*, 1975 S.C. 1534.

(143) *Ibid*

(144) *Jyotish Chandra v. Meera*, 1970 Cal. 266.

(145) *S.N. Tripathi v. Satish Tripathi*, 1975 All. L.J. 162.

(146) *Mahesh Chandra Sahgal v. Krishna Kumari*, 1971 Cur. L.J. 778.

On reading Sections 10 and 13 together it is clear that the relief of judicial separation can be sought on any one or more of the following grounds, namely,

1 that the respondent has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse, [See Section 13 (1) (i)].

2 that the respondent has, after the solemnisation of the marriage treated the petitioner with cruelty, [See Section 13 (1) (i-a)]

3 that the respondent has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition, [See Section 13 (1) (i-b)]

4 that the respondent has ceased to be a Hindu by conversion to another religion, [See Section 13 (1) (ii)].

5 that the respondent has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent; [See Section 13 (i) (iii)].

6 that the respondent has been suffering from a violent and incurable form of leprosy, [See Section 13 (1) (iv)]

7 that the respondent has been suffering from venereal disease in a communicable form, [See Section 13 (1) (v)]

8 that the respondent has renounced the world by entering any religious order [See Section 13 (1) (vi)]

9 that the respondent has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it had that party been alive, [See Section 13 (1) (vii)]

Certain additional grounds are available to a wife for seeking judicial separation from her husband. They are

1 that in the case of marriage solemnised before the commencement of this Act, the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of solemnisation of the marriage with the petitioner provided that in either case the other wife was alive at the time of presentation of the petition, [See Section 13 (2) (i)].

2 that since the solemnisation of the marriage the husband had been guilty of rape sodomy or bestiality, [See Section 13 (2) (ii)]

3. that a decree or order, as the case may be, had been passed in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956, or in a proceeding under Section 125 of the Criminal Procedure Code 1973 or its corresponding provision under the Code of 1898 and that since the passing of such decree or order cohabitation between the parties had not been resumed for one year or more; [See Section 13 (2) (iii)].

4 that the marriage had been solemnised (whether consummated or not) before she attained the age of 15 years and she had repudiated the marriage after attaining that age but before attaining the age of 18 years. [See Section 13 (2) (iv)].

4 Section 10 and other enactments—The Hindu Marriage Act deals specifically with marriage. Hence unless in any other enactment there is a provision which abrogates any

provision of the Hindu Marriage Act or repeals it expressly or by necessary implication, the provision of the Hindu Marriage Act alone will be applicable to the matters dealt with and covered by the same.¹⁴⁷ Section 18 of the Hindu Adoptions and Maintenance Act does not amend or abrogate the provisions of Section 10 of the Hindu Marriage Act.¹⁴⁸

Determination by the deserted spouse not to take back the deserting spouse.—Where the deserted spouse is determined not to take back the deserting spouse even when the latter wants to resume cohabitation and restoration of conjugal life, the deserted spouse becomes the deserting spouse and cannot get any relief on the ground of desertion. *Fishburn v. Fishburn*.¹⁴⁹

NULLITY OF MARRIAGE AND DIVORCE

11. **Void marriages.**—Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto * [against the other party] be so declared by a decree of nullity if it contravenes any of one of the conditions specified in clauses (i), (ii) and (v) of Section 5.

Section 11—Synopsis

1. Scope.

2. Void marriage

1 **Scope.**—The section is not applicable to marriages solemnized before the commencement of this Act. Under the section, the husband or the wife has to present the petition, if the marriage between them is to be declared null and void or if a dispute arises between the parties and others regarding the validity of the marriage. But a person who is not a party to the particular marriage sought to be declared void has no *locus standi* to seek relief under the section. A suit for a declaration that the marriage in question is void may be filed by him under Section 9, Civil Procedure Code read with Section 34, Specific Relief Act.¹⁵⁰ The words "either party to the marriage" have reference to the actual parties to the marriage.¹⁵¹ The words "against the other party" set at rest conflicting views on the question whether a petition can be filed under the section after the death of the other spouse and against a third party.¹⁵² They make it clear that the petition can be only against the other party to the marriage and hence it can be brought only during the lifetime of the parties to the marriage. The remedy provided by the section is of a summary nature and available only to the actual parties to the void marriage.

The section is not violative of Article 15 (1) of the Constitution.¹⁵³

In *Chinnaswami v. Rajamba*,¹⁵⁴ it was held that a second marriage contracted during the period when the Madras Hindu Bigamy Prevention and Divorce Act (VI of 1949) was in

(147) *Robini Kumari v. Narendra*, (1972) 1 S.C.J. 487; 1972 S.C. 459.

(148) *Ibid.*

(149) (1955) 1 All E.R. 230.

(150) *Harmohan v. Kamala Kumari*, (1978) 46 Cut. L.J. 545.

(151) *Lakshmi Ammal v. Ramaswami Nalaker*, 1960 Mad 6; *Shantabai v. Tarachand*, 1966 M.P. 8.

(152) As to this see *Gouri v. Thudasi*, 1962 Mad. 510 favouring the stricter view and contra *Lakshminarayana v. Thapanna*, 1974 A.P. 255; *Talwar Devi v. Krishna Devi*, 1973 Punj. 442; *Kannabai v. Jodha*, 1976 M.P.L.J. 630; *Pannabai v. Kamabai*, (1978) 1 M.L.J. 448; 1978 Mad. 226.

(153) *Sambiraj v. Jayamma*, (1972) 1 An. W.R. 294; 1972 A.P. 156.

(154) 1961 Mad. 525.

*Inserted by Act 68 of 1976, Section 5.

force being void under Section 4 thereof, cannot become valid by reason of the repeal of that Act, and the "husband" is entitled to the declaration that the defendant is not his wife on account of the marriage being void.

2. Void marriages—Void marriages are marriages which violate the provisions of clauses (1), (iv) and (v) of Section 5 namely, a marriage when either party to it has a spouse living at the time, a marriage contracted between parties who are within prohibited degrees and a marriage contracted between relations who are sapindas of each other. The section applies only to a marriage contracted after the enactment of this Act and not as in the case of a marriage comprised in the next section to a marriage which takes place either after the Act or which took place before the Act. If a marriage had taken place either when a previous marriage was existing or within the sapinda relationship or within the prohibited degrees prior to the Act, that marriage would not be governed by this section and its validity or otherwise has to be judged by the law existing at the time of the said marriage. But if a marriage is subsisting even after the Act, the first prohibition, namely, the prohibition of a marriage during the subsistence of the prior marriage would be attracted and the second marriage contracted after the Act would be a nullity and void *ab initio*. Even in the case of a marriage contracted between relations who are sapindas or who are within the prohibited degrees, there may be a custom validating such a marriage, a custom which is specifically saved under Section 5, clauses (iv) and (v).

Under this section where a husband contracted a second marriage after the Act while he had the wife by the first marriage contracted prior to the Act living, it is not open to the first wife to file a petition for a declaration that the husband's second marriage was null and void. It is no doubt open to the second wife to have her own marriage declared void on the ground of the continuance of the first marriage.¹⁵⁵ But the first wife while she can get an order for judicial separation as against the husband cannot maintain an application under this section for declaration of nullity of the second marriage, *Amaral v. Vijaya Bai*.¹⁵⁶

But though the first wife cannot maintain an application under the section, she can file a suit under the ordinary law for a declaration that the marriage of her husband with the second wife was illegal and void under this Act *Lakshmi Ammal v. Ramaswami Naicker*.¹⁵⁷ In *Kodarnath v. Smt. Suprasta*,¹⁵⁸ it was held that the first wife cannot present the petition for annulment of the husband's second marriage on the ground that the second marriage was contracted contrary to and in violation of the provision in Section 5 (1) and that such a petition can be filed and maintained only by the husband or the second wife. The first wife can however seek her remedy under the general law.

It is provided in Section 16 of this Act that despite the declaration of nullity, the offspring of the marriage, male or female, is legitimate with the right of inheritance to either of the parents and under Sections 24 and 25, provisions are made for maintenance *pendente lite* and expenses of proceedings to either spouse who is without means when a petition is instituted under Section 11 for declaring the marriage a nullity.

(155) *Rajula Bai v. Suka*, 1971 M.F.L.J. 1014.

(156) 1959 M.P. 400.

(157) 1960 Mad. 6; I.L.R. (1959) Mad. 634; 1959 M.L.J. 335; 72 L.W. 349.

(158) 1963 Patna 311.

lage.—(1) Any marriage solemnized, whether, before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

- [(a) that the marriage has not been consummated owing to the impotence of the respondent; or]
 - (b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or *any, contrary to public policy*
 - (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under Section 5, the consent of such guardian was obtained by force ••[or fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent]; or
 - (d) that the respondent was, at the time of the marriage, pregnant by some person other than the petitioner.
- (2) Notwithstanding anything contained in sub-Section (1), no petition for annulling a marriage
- (a) on the ground specified in clause (c) of sub-section (1) shall be entertained, if—
 - (i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or
 - (ii) the petitioner, has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;
 - (b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the Court is satisfied—
 - (i) that the petitioner was at the time of the marriage ignorant of the facts alleged;
 - (ii) the proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriage solemnized after such commencement within one year from the date of the marriage; and
 - (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of •••[the said ground].

SECTION 12—SYNOPSIS.

- | | |
|---|---|
| 1. Scope of the section. | 9. Barrenness and sterility. |
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*Substituted by Act 66 of 1976, S. 6.

••Substituted by Act 66 of 1976, S. 6 for "or fraud".

•••Substituted by Act 66 of 1976 for "the grounds for a decree".

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| 16 Consent induced by fraud | 20. Limitation of one year for presenting the petition. |
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1. **Scope of the section**—This section deals with voidable marriages as distinguished from void marriages covered by the previous section. The difference between a void and a voidable marriage is this, that in the case of a void marriage, there is no need to have it declared a nullity, though a decree of nullity may be obtained at the option of either party, but in the case of a voidable marriage, though it is avoidable by a decree of nullity, it is not void *ab initio* and will continue to be valid unless and until it is set aside by the party aggrieved. The right of a spouse to the annulment of marriage by a decree is a new right created by the Act. Its scope has to be ascertained only with reference to the provisions of Section 12. Doctrines like “want of sincerity” and “approve and reprobate have no place in the context of proceedings for nullity under the Hindu Marriage Act ¹⁵⁹ The Court has to be satisfied firstly, that any of the grounds listed in the section exists and secondly, that the petitioner is not disqualified for any of the reasons stated in Section 23 (1) from being granted relief.¹⁶⁰ There can be no annulment of marriage on humanitarian grounds and a plea for avoidance of the same on the ground of domestic infelicity is unsustainable *Munishwar Dutt v. Indhar Kumari*.¹⁶¹

A fresh marriage contracted during the subsistence of a voidable marriage and before it is annulled by a decree of nullity will be considered a bigamous one, and either spouse of the second marriage is liable under the penal provisions of Section 18 of this Act. But not so in the case of a void marriage where neither party thereto will be liable to the said penal provision by reason of contracting a second marriage ignoring the previous void marriage. In *Paramaswami Pillai v. Sornathammal*,¹⁶² it was held that a marriage with a sexless or impotent person is only voidable and no declaration that it is void can be given or asked for after the death of either spouse under this section.

In view of sub-section (2) (b) of Section 12, the provisions of Section 12 (1) (d) would now be obsolete with respect to marriages solemnized before the commencement of the Act.

2. **Impotency of the respondent.**—Clause (a) of Section 12 (1) provides that a petition can be filed for a decree of nullity in respect of a marriage on the ground that the marriage has not been consummated owing to the impotency of the respondent. Prior to the amendment in the clause by Act 68 of 1976 to obtain a decree of nullity the petitioner would have to establish that the respondent was impotent at the time of the marriage and continued to be so till the institution of the suit.¹⁶³ Before the amendment, if a party was not impotent at the time of marriage but became impotent before the institution of the suit the petitioner would not be entitled to a decree. Alternatively if the respondent was impotent at the time of marriage but was not impotent at the institution of the suit a decree must be refused,

(159) *S v. R*, 1968 Delhi 79.

(160) *Ibid*

(161) *I.L.R.* (1963) 2 *Punj* 263; 1963 *Punj* 449.

(162) (1969) 1 *M.L.J.* 167

(163) *Duggrey v. Prataphamari*, 1970 *S.C.* 187.

Now however the statute has placed emphasis equally on the consummation of the marriage and the impotence of the respondent. If there was no consummation of the marriage due to impotence of the respondent the petitioner will be entitled to a decree.¹⁶⁴ Even if the respondent may not have been impotent at the time of the marriage but was found to be so when consummation was attempted a decree of nullity may be granted.¹⁶⁵ Where the marriage was consummated and the impotency developed only subsequently the marriage will not be voidable under this section.¹⁶⁶

3. Reason of the rule—Capacity to consummate is an implied term of every marriage contract and though a Hindu Law marriage whether contracted under the old law or under this Act cannot strictly be called a contractual alliance, there can be no doubt that procreation and intercourse either for pleasure or for progeny are essential motives that actuate the alliance. So if it is found that the essential object of marriage must be frustrated by reason of the impotency of either spouse, then that should be a ground for enabling the other spouse to break away from the marriage bond by resort to a decree of nullity. In the nature of things, it is the party who has suffered that can sustain the petition and not anybody else during his or her lifetime or after that lifetime, *A. v. B.*¹⁶⁷ *Ram Devi v. Rajaram.*¹⁶⁸

Where it is proved that the husband has not been able to perform sexual intercourse even after a fair trial has been given to him by his wife, it must be held that the husband is impotent within the meaning of Section 12 (1) (a) *Jagdish Kumar v. Smt. Sita Devi.*¹⁶⁹

4. Meaning of impotency.—Impotency means incapacity to consummate the marriage by actual sexual intercourse. In Rayden on Divorce, Vth Edition, page 17, this matter is dealt with as follows:

"If at the time of the marriage one of the parties is and continues to be incapable of effecting or permitting its consummation by reason either of some structural defect in the organs of generation which is incurable and renders complete sexual intercourse impracticable, or of some incurable mental or moral disability resulting, in the man in inability to consummate the marriage with the particular woman, or in the woman in an invincible repugnance to the act of consummation with the particular man, the marriage may, on the petition of the other party, be declared null and void." In Fraser's Book, Husband and Wife at page 83 occurs the following passage:

"The *potentia copulandi* is a resulative condition of the contract (marriage) without which it is not binding. The man and the woman have in words made over a right to their persons respectively for the purposes of marriage, but making over this right is in effect making over nothing where one is impotent and incapable. It is true that consummation is not necessary to complete the marriage, but at the same time although consent, and that alone, will have

(164) *Somar v. Sengdha*, 1977 Cal. 213, See also *Smt. Suresh v. G.M. Achary*, 1979 A.P. 169, (1978) 2 An W.R. 522. *Rajender v. Shanti Devi*, 1971 P. & H. 181.

(165) *Somar v. Sengdha*, *supra*.

(166) See *H v. H*, (1928) 30 Bom.L.R. 523, 526.

(167) (1868) L.R. 1 P. & D 555 17 W.R. 14.

(168) (1963) Allahabad 564.

(169) 1983 Punt. 114

this effect, yet this consent is always understood to have been given under the condition of the party having at the time the *potentia copulandi*; and this being of the essential to the contract it is annulled if the condition should fail." In American Jurisprudence, Vol. 17, it is stated at page 223 as follows

"It is well settled both in England and in this country that impotency does not render the marriage void but merely voidable and the marriage is regarded valid unless avoided by some Court having jurisdiction during the life of both parties." This is the view that has been adopted under this Act. See (contra) *Ratan Mani v. Nagendra*, 178 A. v. B. 171

Parties to a marriage are presumed to have capacity for sexual intercourse. Impotence is absence of such capacity.¹⁷³ It is inability to perform the sexual act.¹⁷³ It means not partial or imperfect but a normal and complete coitus.¹⁷⁴ Sexual intercourse or consummation is sometimes known as *vera copula*, signifying intercommunion, that is of erection and penetration by the male of the woman. Full and complete penetration is an essential ingredient of ordinary and complete intercourse.¹⁷⁵

A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility.¹⁷⁶ It may be due to a structural defect in the genital organs which is incurable and makes complete sexual intercourse impracticable or to some incurable mental or moral disability *vis-a-vis* the other spouse resulting in inability to consummate the marriage.¹⁷⁷

The degree of sexual satisfaction obtained by the parties is irrelevant.¹⁷⁸ The presence or absence of the uterus is immaterial to the question whether a woman is impotent or not.¹⁷⁹ Simply because the ovaries of the wife were not developed or that she was having no menses or that she was sterile it would not mean incapacity to consummate the marriage.¹⁸⁰ Failure to cope with over-sex of the petitioner does not necessarily mean impotence of the respondent.¹⁸¹

5. **Causes of impotency.**—Impotency of a spouse may be due to various causes both bodily and mental. A morbid and invincible repugnance to the act of consummation or disability to consummate owing to mental or moral causes such as hysteria or excessive sensibility

(170) 1949 Cal. 404.

(171) 54 Bom. L.R. 725.

(172) *Venkateswara Rao v. Nagamani*, 1962 A.P. 151; *Leoni Devi v. Babulal*, 1973 Raj. 89; *Anandam v. Nalin*, (1975) 77 Punj. L.R. (D.) 100; *Udaman v. Indrajit*, 1977 P. & H. 97.

(173) *Rajinder v. Shanti Devi*, 1978 P. & H. 181.

(174) *Swarnabahu v. Rashmikan*, 1970 Guj. 43; *Anandam v. Nalin*, *supra*.

(175) *Samar v. Saigalla*, 1977 Cal. 213.

(176) *Durgin v. Prapad Kumar*, 1970 S.C. 137. See also *Swarnabahu v. Rashmikan*, *supra*; *Shawati v. Bhawee*, 1971 M.P. 168.

(177) *Swarnabahu v. Rashmikan*, *supra*; *Samar v. Saigalla*, *supra*.

(178) *Samar v. Saigalla*, *supra*.

(179) *Samar v. Saigalla*, 1975 Cal. 413.

(180) *Shawati v. Bhawee*, *supra*.

(181) *Rajender Kaper v. Man Mohan Singh Tandon*, 1972 P. & H. 142.

or the absence of necessary organs or by the presence of excessively abnormal proportions of the sex organs or general weakness produced by self-abuse, or excessive sensibility rendering sexual intercourse practically impossible on account of the pain it would inflict or an inveterate repugnance to the sex act resulting in the paralysis of the will, will all be considered as constituting impotency for the purpose of sustaining a petition for a decree of nullity on the ground of the marriage being voidable. Impotency may be due to invincible repugnance to the act of consummation resulting in a paralysis of the will¹⁸² or to temporary absence of desire or to timidity or to sexual over-indulgence etc.¹⁸³ The mere fact that the respondent is afflicted with a venereal disease does not in law render him or her impotent. If the wife is capable of *vera copula* and *natural coitus*, the absence of procreating or conceptive power is no ground for a decree of nullity. Barrenness or sterility is in no sense a synonym of impotency. In *B. v. B.*,¹⁸⁴ it was pointed out that the incapacity to consummate the marriage, whatever be the reason of such impracticability, whether due to structural defect or otherwise, amounts to impotency justifying the Court's interference for relief.

6. Impotency inferred.—Impotency signifies physical and incurable incapacity to consummate the marriage,¹⁸⁵ i.e., to have sexual intercourse natural and complete. It is a matter for inference from the proved facts in each case. Where both the spouses were young, educated and healthy and had adequate opportunity and the necessary privacy to consummate the marriage and still the husband did not do so a presumption may be drawn that the husband was psychologically impotent towards the wife.¹⁸⁶ When a newly married couple are allowed to spend six nights together in a separate room and the girl having a normal hymen is found to be a virgin the only conclusion to be reached is that the marriage has not been consummated¹⁸⁷. Where after seven days cohabitation there was failure by the husband to consummate the marriage and the husband contended that the time was not long enough to determine whether the marriage could be consummated it was held that the wife was entitled to a decree since the marriage had not been consummated owing to the husband's incapacity.¹⁸⁸ Where it was shown that the husband whose potency was admitted made frequent attempts over a protracted period to consummate the marriage but failed owing to the unreasonable resistance of the wife and the resistance continued even after she had formally consented to perform her conjugal duty and there was no structural defect, the wife's refusal was due not to obstinacy or caprice but to an invincible repugnance to the act of consummation¹⁸⁹. Attempt by the husband only on one night after the marriage to consummate the marriage and the wife's refusal thereto on the ground that she had been forced into the marriage coupled with her leaving thereafter to her parents' house does not warrant inference of incapacity on her part to consummate the marriage.¹⁹⁰

(182) *G. v. G.*, 1924 A.C. 349; *Bull v. Bull*, 1938 Cal. 684.

(183) *Ukman v. Indrajit*, 1977 P. & H. 97.

(184) (1958) 1 W.L.R. 619.

(185) *A. v. B.*, 54 Bom. L.R. 725; *Jagdish Lal v. Sripati Madan*, 1966 All. 156; *Chanchal Kumari v. Kunal Krishna*, 1972 P. & H. 474 Gt.; *Mathuram Augustine v. Vijayaram*, (1979) 2 M.L.J. 301 (P.B.).

(186) *Ashok Kumar v. Nirmal Kanya*, 1978 Rajdhani L.R. 36; 1978 Mat. L.R. 1 (Dethi).

(187) *Ukman v. Indrajit*, 1977 P. & H. 97.

(188) *B. v. B.*, (1958) 2 All E.R. 77.

(189) *G. v. G.*, *Supra*.

(190) *Brji Vallabhai v. Sumitra*, 1975 Raj. 123.

7. Curability of the defect.—In England as well as in America, it is recognised that impotency to be a ground for divorce must be incurable. There is no such condition or qualification imposed by this clause for impotency operating as a ground for a decree of nullity. In England and America it is generally held that if the condition of the respondent is curable with medicine or will yield to or can be removed by a surgical operation not greatly dangerous to life or extremely painful, divorce must be denied if the defending spouse has not refused and does not refuse to submit to the requisite treatment, although upon refusal to submit to such treatment, the impotency may be regarded as permanent. In *H. v. P.*¹⁹¹ it was held that where it appeared from the husband's evidence that whenever he sought to have sexual intercourse it produced hysteria on the wife's part and hence the marriage could not be consummated for a long time and the wife refused to submit to inspection to find out if the defect is curable, the petitioner was entitled to a decree of nullity. A malformation would be held to be incurable if the curing of it is attended with great risk to life and is of doubtful success, *Serrell v. Serrell*.¹⁹² But *L v L*,¹⁹³ where it appeared that the wife might probably be cured if she would submit to an operation involving no great risk to life but she refused to do so, the Court granted a decree of nullity.

The question of curability of impotency is not a relevant consideration for the purpose of a decision under section 12 (1) (a) as amended in 1976. If it is found that there was no consummation of the marriage due to the impotency of the respondent, the petitioner is entitled to a decree.¹⁹⁴ Whatever might have been the position at the time of the marriage, if it is clear he is due to surgical treatment or otherwise the marriage is capable of consummation at the time relief is sought no decree of annulment of marriage can be granted.¹⁹⁵

8. Impotency qua the petitioner.—A person may be potent generally and yet incapable of performing sexual intercourse with a particular individual.¹⁹⁶ A husband generally potent but impotent with respect to his own spouse has to be regarded as impotent for the purpose of section 12 (1) (a).¹⁹⁷ For a decree of nullity of marriage under this section, it is not necessary to show universal impotency on the part of the respondent. It is sufficient if impotency of the respondent is proved as regards the petitioner, that is, if the respondent is entirely incapable of sexual intercourse with the petitioner, though not with other persons, a decree of nullity may be granted. The marital relation being with the petitioner, if the respondent is incapable of consummation with the petitioner, the contract of marriage ought to be dissolved despite the power of the respondent with respect to other persons. Hence, the principle must be that relative and not absolute impotency is necessary

(191) (1873) L.R. 3 P. & D 126

(192) (1862) 28 Sw. and Tr. 422.

(193) 7 P.D. 16.

(194) *Somar v. Singdeo*, 1977 Cal. 213.

(195) *Rajender v. Shanti Devi*, 1978 Punj 181

(196) See *Jagdish Lal v. Shyam Nandan*, 1966 All 150; *Shantobai v. Jorachand*, 1966 M.P. 8.

(197) *Sunderdas v. Rajinder*, (1975) 77 Punj. L.R. (D.) 78. See also *Laxmi Devi v. Bahadur*, 1973 Raj. 89; *Udhawan v. Indrajit*, 1977 P. & H. 91; *Smt. Suresh v. G.M. Achary*, (1976) 2 And. W.R. 522.

and sufficient, *N. v. M.*¹⁹⁸ *H. v. H.*¹⁹⁹ In *H. v. H.*²⁰⁰ it was further held that if a party to a marriage once deliberately affirms the marriage by allowing a previous petition for declaring the marriage a nullity to be dismissed he or she cannot subsequently be allowed to object to the marriage and file a petition for a nullity decree on the same ground.

9. **Barrenness and sterility.**—Impotency does not signify sterility but incapacity to have normal sexual intercourse.²⁰¹ Barrenness and sterility by themselves cannot and do not prove impotency, however long had been the period of such defect. Inability to beget and bear children is not a ground for dissolving the marriage if it is not proved that there was no power of complete copulation. If the wife is capable of *vera copula* and *natural coitus*, the absence of procreative or conceptive power is not a ground for a decree.

In *Kanth v. Hary*²⁰² it was held that where the marriage could not be consummated in the ordinary normal way on account of the abnormal size of the respondent's (husband's) organ, the respondent must be considered impotent so far as the petitioner was concerned. In *George v. Sundari*,²⁰³ Justice Ramaswami lays down that if at the time of the marriage one of the parties is and continues to be incapable of effecting or permitting its consummation by reason of either some structural defect in the organs of generation which is incurable and renders complete sexual intercourse impracticable or of some incurable mental or moral disability resulting in the man in inability to consummate the marriage with the particular woman, or in the woman in an invincible repugnance to the act of consummation with the particular man, the marriage may be declared avoided by a decree of nullity, *Rangaswami v. Rangaswami*.²⁰⁴

10. **Burden of proof**—As a general rule the burden of proof on the question of impotency of the respondent is upon the petitioner.²⁰⁵ The impotency of the respondent being a peculiar matter within the exclusive knowledge of the spouses, *proof aliunde* of the infirmity is always difficult, but where a decree of nullity on the ground of the respondent's malformation is sought, the relief need not be granted unless the existence of incurable malformation which prevents the sexual intercourse is spoken to by the medical man who has examined the respondent.²⁰⁶ It is not competent, in the absence of provision, to any party to compel

(198) 2 Roberts Ecc. R. 625

(199) 1928 Bom. 279

(200) Ibid

(201) *Shewants v. Rihuroo*, 1971 M.P. 168, *Nyhanwan v. Nyhanwan*, 1973 Delhi 200; *Ushman v. Ladeget*, 1977 P. & H. 97

(202) 1954 Mad. 316 I.L.R. (1954) Mad. 15; (1953) 2 M.L.J. 689 66 L.W. 1029

(203) 67 L.W. 676 1957 Mad. 253

(204) 1957 Mad. 243.

(205) *Rajinder v. Shanti Devi*, 1978 P. & H. 181.

(206) See in this context *D. v. A.*, (1845) 1 Rob. Ecc. 279 [incipient vagina in the form of a *cul-de-sac*—decree of nullity granted], *Laxmi Devi v. Bajpal* 1973 Raj. 89 [artificial vagina of 2½ inches length constructed where previously there was none—incapacity for sexual intercourse inferred]; *Sagar v. Saggda*, 1977 Cal. 213 [respondent suffering from agnathismus which even after surgical treatment made intercourse painful—consummation considered not possible]; S.Z. v. S.Z., (1983) P. 67 [coitus by means of artificial vagina held to amount to *vera copula* so as to consummate]; *M. v. S.* 1963 Ker. L.T. 315 [after surgical operation vagina permitting sexual

the other party alleged to be impotent to submit to medical examination.²⁰⁷ The Court no doubt has got the power to order the medical examination of the respondent but this power has got to be used with great caution, due regard being had to the protection necessary to be given against violence to natural delicacy and sensibility especially of the female spouse. No doubt, if the respondent refuses to submit herself or himself to the medical examination necessary to corroborate the evidence of the petitioner, it is open to the Court, to draw an adverse inference against the refusing party, but it is not bound to do so. *Birendra Kumar v. Hemalata*²⁰⁸ Husband's admission of impotency is sufficient proof and no further evidence is needed.²⁰⁹ If the respondent confesses to non-consummation and refuses to undergo medical inspection decree of nullity may be granted.²¹⁰ In a proceeding under section 12 (1) (a) where the evidence of one spouse alone is available there is no need for corroboration if such evidence is reliable.²¹¹ Medical certificates do not prove themselves and must be strictly proved by the doctor issuing them, who must state what tests he carried out for arriving at his conclusion and must be able to stand cross-examination and convince the Court about the correctness of the said conclusion, *Gonsalves v. Iswariah*.²¹² Where the evidence establishes the possibility of only an incipient or imperfect coitus, impotency must be held to have been proved *Clarke v. Clarke*.²¹³ It is said that if the marriage remains unconsummated and the spouses, appear to be capable, it must be presumed that the incapacity must be imputed to the man and not to the woman, but this is a presumption of fact which can be rebutted by medical evidence.

11. Unsoundness of mind or mental disorder or insanity or epilepsy—As a general rule, a marriage contract will not, however, be decreed void on the ground of want of mental capacity unless there was at the time of the marriage such a want of understanding in the party as to render him or her incapable of understanding the obligations and the nature of the contract and whatever might have been the condition of the party's mind at other times, its condition at the time of the marriage itself must govern the question of capacity. As stated in American Jurisprudence, Volume 17, section 170 at page 227, it is declared that regardless of whether or not the subjection of the will to some wild or uncontrollable impulse, appetite, passion or propensity is attributed to disease and considered a species of insanity, yet as long as the understanding remains so far unaffected and unclouded that the

intercourse]. *Ganeshji v. Hastulabai*, (1967) 8 Guj L.R. 966 [vagina after surgical operation capable of permitting normal coitus negatives impotence], *Rajendar v. Shanti Devi*, 1978 P. & H. 161 [Doctor certifying vagina though only 1½ inches no obstacle to sexual union—impotency negated]

(207) *Revamma v. Shanthappa*, 1975 Mys. 136.

(208) 24 C.W.N. 914 See in this context *Biswas v. Biswas*, 1 L.R. 48 Cal. 283; *Bijay Chandra v. Madhulaben*, 1963 Guj 250, cf. *Mitra v. Mitra*, 1971 Cal. 1, *Maragathamani v. Ebenezer*, 1971 Mad. 27, *Mathuram Augustine v. Vijayarani*, (1979) 2 M.L.J. 301 (P.B.) [cases under the Divorce Act] See further the English decisions *F v. P.*, (1896) 75 L.T. 102, *B. v. B.*, (1901) P. 39, *W. v. S.*, (1905) P. 231.

(209) *Sucharia v. Rajender*, (1976) 77 Punj. L.R. (D) 79.

(210) *Harrison v. Harrison*, 4 Moo. P.C. 96; but see *Arun Kumar v. Sudhansu Bala*, 1962 Orissa 65.

(211) *Swarnabahan v. Rashmi Kant*, 1970 Guj 43 Cl., however *T.F.C.D. v. D.*, L.R. 1 P. 127

(212) 1953 Mad. 848

(213) (1943) 2 All E.R. 540

afflicted person is cognizant of the nature and obligation of the contract, the case is not one authorising a decree avoiding the contract. This test of the capacity to understand the marital obligation existing at the time of the contract is applicable even in cases of a person who is afflicted with the malady of the mind periodically or temporarily. Still the question is, was the man or the woman, when entering into the contract of marriage at the time of its solemnisation, in such a state of mind as to comprehend and understand the obligations of matrimony. If the answer is "yes", the marriage is valid. If the answer is "no" it is liable to be declared void.

Under Section 12(1) (b) read with Section 5 (ii) a marriage becomes voidable and may be annulled if at the time of marriage the respondent was incapable of giving consent due to unsoundness of mind²¹⁴ or though the respondent was capable of giving a valid consent that person was suffering from mental disorder of such kind and degree as to render that person unfit for marriage or begetting children or the respondent had been subject to recurrent attacks of insanity or epilepsy.²¹⁵

A marriage of a person subject to temporary or periodical insanity, if contracted during a lucid interval, is valid whatever might have been the condition of his mind either before the marriage or after it. See a lucid exposition of the position with reference to annulment of marriage on the ground of insanity of one of the spouses at the time of the marriage in *Munishwar Datt v. Indira Kumari*.²¹⁶ Subsequent recovery of the person from unsoundness of mind does not affect the question of the validity of the marriage.²¹⁷ Medical evidence, though it may not in all circumstances be a determining factor, is none the less a most important element of evidence. Both pre-nuptial and post-nuptial physical or mental state of the respondent may be considered to determine the respondent's mental state at the time of the marriage.²¹⁸

12 Evidence and presumption—The burden of proving that the respondent was of unsound mind at the time of the marriage is upon the petitioner. That is discharged by showing that immediately before and after the solemnisation of marriage the respondent has been proved to be of unsound mind. The burden then shifts to the respondent to show that when the marriage was contracted he or she was in a lucid interval and therefore the marriage was valid. The latter burden is a very serious and heavy burden indeed, and the question of its discharge must necessarily depend upon very cogent and clinching evidence regarding the lucidity of the mental condition at the time of the marriage. More often than not, the question has got to be resolved by resort to the assistance of medical opinion of experts who have had the opportunity of observing the alleged lunatic and studying his ways of mind and answers to relevant questions. In *G v. M*.²¹⁹ Lord Selborne has opined that where the party knowing that the other was a lunatic at the time of the marriage approbated the marriage and

(214) *Amina Roy v. Probodh Mohan Roy*, 1969 Cal 394; *Pranab Kumar v. Krishna*, 73 Cal WN 448 1975 Cal 109; see also *Ali Tishi v. Jones*, 1934 All. 273.

(215) *Bari Devi v. Banerjee*, 1972 Delhi 50.

(216) L.L.R. (1963) 2 Punj 263 1963 Punj. 440.

(217) *Pranab Kumar v. Krishna*, *supra*.

(218) *Kartik Chandra v. Manjivani*, 73 Cal W.N. 36: 1973 Cal 545.

(219) 10 Appeal Cases 171.

has received benefits therefrom and it would be unfair and inequitable to permit him or her to disown the marriage bond after having received advantages the principle of estoppel may well be applied to prevent the spouse so benefited to go back upon the relationship. But even where the medical evidence let in is, as often happens, not very conclusive, there is nothing to prevent the Court from weighing the evidence of parties and preferring the evidence on one side to the evidence on the other in adjudicating on the respective contentions.

13. Consent obtained by force or fraud—Section 12 (1) (c) lays down that a marriage is voidable on the ground that the consent thereto of the petitioner, or of the guardian of the petitioner where the bride had not completed 18 years of age has been obtained by force or fraud. For the clause to be attracted the consent should have been obtained by force or fraud before the marriage was solemnised. There is no requirement that it should have been obtained only at the time of the marriage. ²²⁰ A petition on this ground cannot be entertained if it is presented more than one year after the force had ceased to operate or the fraud had been discovered or if the petitioner has, with his or her full consent, lived with the other party as husband and wife after the force had ceased to operate or, as the case may be, the fraud had been discovered [Section 12 (2) (a) (ii) and (iii)].

14. Force—It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as would impel the person of ordinary courage and resolution to yield to it. This is not an accurate statement of the law. Wherever owing to some natural weakness of intellect or some fear whether reasonably entertained or not, either party is in a state of mental incompetence to resist the pressure improperly brought to bear, there is no more consent than in the case of a person of strong intellect and more robust courage yielding to more serious danger. *Scott v. Sebright* ²²¹ It is not necessary that the force or threat that has compelled the consent must have been made by the respondent personally. It is enough if the respondent knew at the time of the marriage that the consent had been obtained by force and was not a free consent. It is not necessary that the person responsible for the threat is a relation or friend of the respondent. The proper meaning of that term is that the consent must have been induced or compelled as a result of an apprehension of injury actually threatened or factually inflicted. It is not necessary that the person had not intended to go through the form of marriage which he or she had been compelled to go through as an automaton, he or she cannot be deemed to have gone through the marriage at all and such marriage would be invalid. ²²²

Cases of consent induced by force or duress are not very frequent but they are not absent altogether. The following may be taken as illustrative cases which would show the nature of the force or duress that is contemplated under this clause for invalidating the consent required for a valid marriage. In *Scott v. Sebright* ²²³ a young woman fairly well-to-do had become engaged to another and having been induced by him to accept bills aggregating to a considerably large amount, found herself in distress on account of the threats of action against her by those who had discounted the bills. This distress affected her health resulting in both mental and bodily prostration reducing her to a position of incapacity to resist coercion or threat. The man to whom she had been engaged and who was the cause of her financial condition told

(220) *Babji Potnato Kurr v. Ram Agula Singh*, 1968 Pat. 190.

(221) 12 P.D. 24

(222) *Ankoma v. Ramenappe*, 1937 Mad. 392; *Anath Nath De v. Lajjibats Dewa*, 1959 Cal. 778.

(223) *Supra*.

her that the only way of avoiding bankruptcy proceedings and exposure was to marry him, and thus coerced she went through a form of marriage having been threatened just before the marriage ceremony that if she evinced any signs of not acting voluntarily during the ceremony he would simply shoot her. The marriage was not consummated and the woman filed a petition for declaration of nullity. This petition was ordered on the ground of force having induced the consent of the petitioner. So also in *Bartlett f. c. Rice v. Rice*,²²⁴ a young woman was forced to consent to marry a man, who had paid attentions to her but whose attentions were repelled, by his showing a pistol and threatening to blow out her brains, and in fear she was forced to go through the marriage ceremony. This marriage was declared a forced marriage and hence void.

Cases have arisen of marriages having been brought about between a seducer and the woman seduced, by force or threat exhibited by the relations of the seduced woman, who naturally thought that the only way of remedying what had happened was to compel the seducer to marry the woman seduced. Even though by reason of the force or threat the consent of the husband cannot be said to be a free consent, still Courts have held that in such cases the force ought not to be allowed to vitiate the marriage and that a petition for declaring the marriage a nullity should not be entertained with sympathy by any Court.

If in any particular case it is found that the consent of the wife had been obtained by the use of force or fraud or similar influence exerted on her by another, even though related to her but interested in the husband, then the marriage cannot be held to be a valid one. For instance in *Clarke v. Clarke*,²²⁵ the petitioner who was about 17 years of age and of weak and nervous temperament was induced by her mother acting in concert with the respondent to go through the ceremony of marriage with the latter. The petitioner, who was under the abnormal influence and control of her mother, was persuaded to go through the ceremony by the representations made by the mother that it was only a betrothal. The marriage was not consummated and was held null and void on the ground that it was vitiated by the duress of the mother. If in this illustration the mother had acted not in concert or collusion or conspiracy with the respondent-husband but of her own accord in the honest impression that such a marriage would be good for the daughter, it cannot be held that the marriage was invalid. The vitiating circumstance in the above marriage was that the mother was practically the instrument of the respondent and what had happened was instead of the respondent overbearing the mind of the petitioner, he had done it through the instrumentality of the petitioner's mother. In law the result would be the same so long as the source of the force can be traced to the respondent. In *Cooper v. Crans*,²²⁶ two cousins entered into marriage the woman consenting by reason of the threat held out by her cousin to shoot himself if she refused to marry him. The marriage was never consummated but it was held that the evidence was not sufficient to rebut the presumption of consent. From the above cases the general principle that can be deduced is this. That the force that must have been exerted to induce the consent must be such as could not be resisted by a person of ordinary understanding and courage. But circumstances in any particular case may exist where a woman by reason of her bodily or mental condition could easily be coerced or frightened into doing an act, which normally she will not do, and if that act happens to be a marriage, through which she goes in a state of mental paralysis or fright, the marriage should be declared null. If, on the other hand, the consent

(224) 72 L.T. 122.

(225) 1886 Prob. 1.

(226) 1891 Prob. 969

is induced by mere empty threats or menaces normally one would not take serious notice of, that could not be pressed into service as a ground for nullifying the marriage. In *Paragheic v. Paragheic* ²²⁷ it was held that a marriage of a daughter brought about by the terror instilled in her by her father was invalid as she never in fact consented to the marriage.

15 Fraud—Fraud vitiates even the most solemn transaction and so does it in the case of a marriage contract. What amounts to fraud and when it will operate as a vitiating circumstance justifying the presentation of a petition under this section must be answered with reference to the facts of each particular case. In the case of force, there is the fear and there is no free consent. In the case of fraud, the consent is there, but there is deception with reference to mistaken or misrepresented facts deliberately presented to influence the mind. No decree or deception can avail to set aside a marriage knowingly made unless the party imposed upon has been deceived into marrying another and thus has given no consent at all. Generally speaking, concealment by one of the parties in respect of his or her status, qualifications, character, reputation, habits, health, etc., is not sufficient for avoiding a marriage on the ground of fraud because in all cases of marriages the parties must take the burden of informing themselves in respect of these matters. In *Rahi Bala v. Ramakrishna*, ²²⁸ it was held that where a woman marries without informing her husband of her previous unchastity, the fact that the husband would not have married her had he known the previous conduct of the wife would not amount to fraud so as to, vitiate it under Section 12 (1) (d). Though prior to the amendment of this clause by Act LXVIII of 1976, some decisions had taken the view that the term 'fraud' in the unamended clause was restricted to deception in relation to the marriage ceremonies or to the identity of the party marrying, ²²⁹ what is 'fraud' is now expressly set out as "fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent." Hence a marriage can now be annulled under Section 12 (1) (e) even if the consent was obtained by fraud as to the nature of material facts concerning the respondent much prior to the date of solemnisation of the marriage. ²³⁰

16 Consent induced by fraud.—Not only force but also fraud may induce a consent which would nullify a marriage. A Hindu marriage is a sacrament and not a contract. Hence 'fraud' in Section 12 (1) (e) cannot be taken to mean the same thing as what is indicated in Section 17 of the Contract Act. ²³¹ Particulars of the fraud alleged must be given in the substantive petition. Mere mention of fraud or fraudulent concealment is ineffective. ²³² The chief ingredient of fraud is deceit or imposition by conduct or representations inducing a belief in the representee in facts which do not exist, or by suppressing such material facts which if known would not have attracted the consent. The position has been succinctly summarised in Rayden on Divorce, page 45 (5th Edn.) as follows. "Fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consented with the knowledge of

(227) (1958) 1 W.R. 1280.

(228) (1969) 73 Cal. W.N. 751

(229) See *Rayaram v. Dandabai*, 1974 M.P. 52; 1973 M.P.L.J. 626, *Padmaja v. Sivaraman*, 1975 Ker. L.T. 213, *Madhurudan v. Chandrika*, 1975 M.P. 174, *Raghunath v. Vijaya*, 1972 Bom. 132.

(230) *Gurnet Kaur v. Narinder Singh*, 80 Punj. L.R. 507.

(231) *Ram Bala Debnath v. R.K. Debnath*, (1969) 73 Cal. W.N. 75, *Harshajan Singh v. Brij Bala*, Kas 1964 Punj. 359, *Raghunath v. Vijaya*, supra, 1972 Bom. 132, *Madhurudan v. Chandrika*, supra; *Padmaja v. Sivaraman*, supra; *Nandkumar v. Manjibet*, 1979 M.P. 45.

(232) *Karish Chandra v. Manjivani*, 1973 Cal. 545.

nature of the contract. But if a person is induced to go through a ceremony of marriage by threats or duress or in a state of intoxication or in erroneous belief as to the ceremony without any real consent to the marriage, it is invalid; in all such cases the test of validity is real consent to the marriage."

Consent of girl obtained by misrepresentation of the age of the bridegroom made to the mother of the bride acting as her agent,²³³ consent obtained by representing the respondent to be a Brahmin boy whereas he was in fact a dasiputra,²³⁴ conducting the ceremony in a language which the petitioner did not know and which she believed to be for her conversion to Hinduism whereas in fact it was a marriage ceremony with the respondent,²³⁵ have been held to make the marriage null and void, but not where consent was obtained by substituting the horoscope of another girl²³⁶ or where the fact of the appellant having been once married to another woman was concealed.²³⁷

17. Concealment of pre-marital unchastity.—The fact that prior to the marriage the wife had been unchaste and was even leading a life of a public woman indulging in promiscuous intercourse with all and sundry will not vitiate the marriage on the ground that she had not disclosed her previous immoral life to her husband and he was unaware of it at the time of the marriage.²³⁸ *A fortiori* if the husband had notice of the immorality he could not complain on the ground that previous to the marriage she had yielded her virtue to another. Even if she had become pregnant prior to the marriage and had even borne children, it would not be a ground for the nullity of a marriage, whether the same was known or not known to the husband. If her husband prior to the marriage did not care to enquire about her antecedents and satisfy himself about the suitability of the alliance in all respects which would influence his consent either way, he must thank himself. No doubt a woman who becomes virtuous after previous bad record may have the courage to tell her future husband what she had been and take the consequence of the refusal. But how many such women can we expect in normal life? In the circumstances therefore, the mere immorality of the wife which is a thing of the past and her concealment of it from the knowledge of the husband, could not be a ground for a decree of nullity and the decisions which held to this effect can be upheld as correct on this ground. See *American Jurisprudence*, Vol. 17, pp 215-217.

18. Concealment of diseases—Concealment by one spouse from the other of the fact of the former's temporary mental derangements occasionally occurring would not be a legal ground authorising a divorce or annulment of the marriage. The law does not guarantee every husband or wife a rational mental standard of mind of the other spouse. In some cases, the existence of venereal disease and its concealment by the spouse suffering from it from the other has been held to be a good ground for the annulment of the marriage.²³⁹

(233) *Babaji Ponnata Kaur v. Ram Agar Singh*, 1968 Pat. 190.

(234) *Bimla Bai v. Sunder Lal*, 1957 M.F. 8.

(235) *Mehta v. Mehta*, (1945) 2 All E.R. 890.

(236) *Padmaja v. Sagarman*, 1975 Ker L.T. 213.

(237) *Rajaram v. Deepak*, 1974 M.F. 52 Cf. *Harbhajan Singh v. Brij Lal Kaur*, 1964 Punj. 459 (concealment of not being a virgin).

(238) *Suryt Kumar v. Raj Kumari*, 1967 Punj. 172 (concealment of past unchastity); *Rani Balu Debnath v. R.R. Debnath*, (1969) 73 Cal.W.N. 751.

(239) Cf., however, *Machandran v. Chandra*, 1975 M.F. 174.

Mere concealment of a disease would not be a ground for avoiding the marriage unless the disease or ailment falls under section 13 of the Act. Hence, the concealment of the fact that the bride was suffering from consumption would not be a ground for avoiding the marriage. *Ananth Nath v. Lajabai Devi* ¹⁴⁰

19. Fraud as to identity of the spouse or the nature of the ceremony etc.—

Though the section does not use the expression "mistake" along with the expression "fraud" as a ground for a nullity of marriage, cases have held that a marriage can be declared void where one of the parties entered into it under a mistake as to the identity of the other person. ¹⁴¹ Such a case may occur where one of the parties is deaf and blind and goes through a ceremony of marriage with another thinking that the latter is a particular person which he is not *Ford v. Slev*. ¹⁴² See also *Harrod, v. Harrod* ¹⁴³ *Ford v. Slev*, ¹⁴⁴ the petitioner was a girl of 17 and she was made to go through a ceremony of marriage with the respondent who was a friend of her brother. On the day of the marriage she was taken to the church where the respondent was waiting for her and the ceremony of marriage was gone through which the petitioner understood as being merely a betrothal. After they came out of the church they separated and subsequently the petitioner married another whereupon the respondent claimed her as his wife. It was held that there had been no marriage of her to the respondent, she having been right through under the impression fraudulently brought about that it was a betrothal.

A marriage of a Hindu minor girl below 15 years cannot be annulled under Section 12 merely because her brother who gave her in marriage was a minor below 18 years. It cannot be said that in such a case the marriage was performed either by force or fraud ¹⁴⁵

20 Limitation of one year for presenting the petition.—A petition for a decree of nullity of marriage on the ground that the consent had been obtained by force or fraud must be presented within one year after the force had ceased to operate, or, as the case may be, the fraud had been discovered. A petition presented even a day after the one year period is incompetent and must be dismissed. The reason is force or fraud though undoubtedly a vitiating circumstance, may not always raise a reaction of dissatisfaction at the marriage brought about. A spouse may not be willing if there had been no force. But after the marriage had been brought about, he or she may awaken to a realisation of the desirability of the alliance in spite of the force or fraud and would consent to the marriage being treated as valid. It cannot be denied that the period of one year prescribed is a long enough period in all conscience, and a spouse who lies by without protest by resorting to the proceedings for nullity of the marriage within this period must thank himself or herself if the petition is dismissed on the ground of belatedness.

It has been held regarding similar provision in section 12 (2) (b) (ii) that it does not prescribe a period of limitation but is in terms mandatory and provides that the Court

(240) 1939 Cal 778. See also *Raghunath v. Vajpey*, (1971) 73 Bom.L.R. 840. [Concealment of bride's suffering from epilepsy does not amount to fraud.]

(241) See *Ragaram v. Durga Bai*, 1974 M.P. 52, 54.

(242) 1896 Prob. 1.

(243) 1 K. and J 4.

(244) *Kalawati v. Dori Ram*, 1961 H.P. 1.

shall not entertain the petition if the conditions laid down therein are not satisfied. Hence a petition filed for nullity of marriage on the ground mentioned in section 12 (1) (d) on the day on which the Court opened after the vacation during which period the period mentioned in section 12 (2) (h) (ii) had terminated, cannot be entertained: *Saparam v. Taseeda Bai*²⁴⁵ *Vellinayagi v. Subramaniam*²⁴⁶

21. **Cohabitation.**—The second ground embodied in clause (ii) of section 12 (2) (a) which prevents a petition for nullity of marriage brought about by force or fraud is, the parties living together as husband and wife, in spite of their knowledge of the fraud or the force employed. This clause or condition does not depend upon the lapse of any time after the discovery of the vitiating circumstance. If the discovery is made even a day prior to the living together as husband and wife which in the context means having sexual intercourse, the petition deserves to be dismissed. The principle underlying this condition appears to be the principle gatherable from the idea of condonation. It is always open to the parties brought together in a marriage despite the force or fraud employed for bringing it about, to stand by that alliance even after their knowledge of the vitiating circumstance, and if they approbate the alliance by living together as husband and wife, it will no longer be open to them to reprobate it by filing a petition for a decree of nullity. Such living together as husband and wife must be with full consent of the spouse on whom the fraud or force has been exerted. Where the husband and wife had lived together after the discovery of the fraud, the period of such living is not relevant for purposes of the condition laid down in Section 12 (2) (a) (ii)²⁴⁷. If on discovery of the fraud by one of the spouses, he or she is prevented from going away and is forced despite his or her will to continue cohabitation, that would not prevent him or her from filing and succeeding in the petition for nullity of marriage on the ground of condonation or acquiescence.

22. **Pregnancy at the time of the marriage:** section 12 (1) (d).—This clause says that a petition for nullity of marriage can be filed by a husband on the ground that the respondent was at the time of the marriage pregnant by some person other than the petitioner. It is necessary to sustain the petition that the petitioner was at the time of the marriage ignorant of the pregnancy of the respondent, and, that the petition is filed within one year after the commencement of the Act in respect of the marriage solemnised before the Act and within one year of the marriage in respect of marriage solemnised after this Act came into force. It is also further necessary that no marital intercourse had taken place since the discovery by the petitioner of the existence of the pregnancy of the respondent. The fact that the respondent was pregnant at the time of the marriage by the petitioner himself would not afford a ground. A question may arise whether the wife's pregnancy caused by intercourse with one other than the petitioner prior to the marriage of which the petitioner was ignorant not having been disclosed by the respondent to the petitioner at the time of the marriage, would invalidate the marriage on the ground of fraud exercised by the respondent, coming under clause (a) of section 12 (1). On this question there is this illuminating passage in the American Jurisprudence, Vol. 17, p. 215. The prevailing American view is that pre-

(245) 1962 Bom. 190.

(246) 1959 Mad. 479; (1960) 1 M.L.J. 394. See also *Nagendra v. Durgabai*, (1973) 14 G.L.R. 820; *Anjaneyy v. Nagamma*, (1972) 2 Mys. L.J. 256; 1973 Mys. 178.

(247) *Shankar v. P. Jagan*, L.L.R. (1977) Bom. 5; 1977 Bom. 132.

nuptial pregnancy by a man other than the husband which is concealed to the husband is a ground for divorce. Unless it appears that the husband himself had intercourse with the wife before the marriage, it has been held unnecessary for the husband to show express representations by the wife that she was not pregnant. In England the rule seems to be that the concealment by the wife of her pregnancy by another man at the time of the marriage is not a ground for decreeing nullity of the marriage at the suit of the husband and the view taken by some Courts of this country appears to be that such ground is not sufficient for decreeing nullity, or that since the grounds for divorce are purely statutory, in the absence of statutory authorisation, a divorce cannot be granted for such cause. The husband's knowledge of the pre-nuptial pregnancy of the wife bars relief for such ground. It is the generally accepted view that if he had sexual intercourse with her before marriage, a decree could not be granted regardless of the paternity of the child and the fact that she represented herself pregnant by him. In such a case the husband, on account of his knowledge of the wife's unchastity, is put on his guard and cannot allege that he was induced to contract the marriage by fraud and deceit on the part of the wife. In some cases this is held to be the rule if the husband had made no attempt to ascertain that such representations are true or false. However it has been held that pre-marital incontinence of the parties will not prevent a man who is deceived by the statement of the woman that she is pregnant by him when in fact another is the cause of the pregnancy from procuring divorce under a statute allowing divorce for fraudulent contract if he acted in the manner as a reasonable man might be expected to act. Furthermore, under a statute expressly providing that ante-nuptial pregnancy of a woman by one other than the husband and the concealment thereof from the husband are grounds of divorce, a husband is entitled to divorce from the wife where she is pregnant by another notwithstanding he might have had intercourse with her prior to the marriage. It is stated that the statute makes no exceptions to the rule therein prescribed because of the husband's participation in his wife's incontinence, and that such participation will not be read into the statute by construction nor does the husband's participation put him on enquiry as to her relations with other men so that he cannot complain²⁴⁸.

Under section 12 of the Hindu Marriage Act in order to sustain a petition the only things that the petitioner has to prove are (1) that at the time of the marriage the wife was pregnant; (2) that the pregnancy was by some person other than the petitioner; (3) that the petitioner was ignorant of the pregnancy at the time of the marriage; (4) that the petition was filed within one year from the date of the marriage and (5) no marital intercourse has taken place since the discovery by the petitioner of the respondent's pregnancy. The burden lies on the petitioner to prove pregnancy of the respondent by some other person.²⁴⁹ The requirement as to filing the petition within one year of the marriage under section 12 (2) (b) (ii) is mandatory.²⁵⁰ Since the requirement is a condition precedent and not a period of limitation Section 5, Limitation Act cannot be invoked.²⁵¹ It would seem that even where the husband's right under the section has been concealed from him by the fraud of his wife during the concerned period a petition under section 12 (1) (d) will not be competent thereafter.²⁵²

(248) *Nandkishore v. Mumbai*, 1979 M.P. 45 (Petitioner should prove beyond reasonable doubt admission of parties may also be considered); *Mahendra v. Sushila*, 1965 S.C. 364; *Nihal Kumar v. Anjali Bismar*, 1968 Cal. 105.

(249) *Rangaswamy v. Nagamma*, (1972) 2 Mys. L.J. 256; 1973 Mys. 170; *Nanjaram v. Drupadibai*, (1973) 14 G.L.R. 620; 1974 Guj. 111.

(250) *Palanigay v. Subramanian*, (1969) 1 M.L.J. 324; 1969 Mad. 479; *Nandkishore v. Mumbai*, *supra*.

(251) *Chaplin v. Chaplin*, (1948) 2 All. E.R. 408.

If it is doubtful whether the pregnancy was by the petitioner or by somebody else by reason the petitioner and others having had intercourse with the respondent prior to the marriage, benefit of doubt must be in favour of the validity of the marriage for in such circumstances it is not possible to say that the respondent was pregnant by some person other than the petitioner. Again if the circumstances proved do not clearly show that the petitioner was ignorant of the fact of the pregnancy at the time of the marriage, and it is doubtful if he knew about it or not, the burden of proof that he did not know about the pregnancy must be thrown on him, the presumption being that he did know about the pregnancy at that time. Again, if marital intercourse was shown to have taken place between the petitioner and the respondent after the discovery by the petitioner of the pregnancy—a circumstance which would be fatal to the maintainability of the petition—the only way in which the petitioner could overcome this hurdle or objection is by proving that the marital intercourse which was had was not with the petitioner's consent, out that he had been forced to it by threat or duress overpowering his will. *Sushila v. Nanavati*,²⁵² *Singara v. Sarda*.²⁵³ Where it was found that the wife had given birth to a mature child within 167 days after the marriage, it was held in the circumstances of the case that the burden of proving that the child was the child of the husband was on the wife *Nihil Kumar v. Anjali Biswas*.²⁵⁴ This case also holds that giving of bloods samples should not be compelled for test of paternity of the child.

Where the medical evidence clearly established that the respondent was pregnant since long before the date of the wedding, the testimony of the doctor who was expert in mid-wifery cannot be rejected on the ground that she had not specialised in gynaecology.²⁵⁵

13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

- *(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
- (i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or
- (i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]
- (ii) has ceased to be Hindu by conversion to another religion; or
- *(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause,

- (a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(252) 1960 Bom. 117.

(253) 1960 Mad. 216

(254) 1968 Cal. 105.

(255) *Baido Raj v. Urmila Kumar*, 1979 S.C. 878.

*Substituted by the Act LXVIII of 1955, s. 7.

- (b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment, or;
- (iv) has, * [***] been suffering from a virulent and incurable form of leprosy; or
- (v) has, * [***] been suffering from venereal disease in a communicable form; or
- (vi) has renounced the world by entering any religious order; or
- (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

****Explanation.**—In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly;

*** (iii) [* * *]

*** (ix) [* * *]

†(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

- (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of $\frac{1}{2}$ [one year] or upwards after passing of a decree for judicial separation in a proceeding to which they were parties; or
- (ii) that there has been no restitution of conjugal rights at between the parties to the marriage for a period of $\frac{1}{2}$ [one year] or upwards after the passing of the decree for restitution of conjugal rights in a proceeding to which they were parties.
- ✓(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground—

- (i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner;

Provided that in either case the other wife is alive at the time of presentation of the petition, or

- (ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or $\frac{1}{2}$ [bestiality; or]

* Certain words omitted by Act LXVIII of 1976, S. 7.

** Inserted by Act LXVIII of 1976, S. 7.

*** The word 'or' at the end of Cl. (iii) and Cl. (ix) omitted by Act XLIV of 1964.

Inserted by the Hindu Marriage (Amendment) Act, 1964, S. 2 (ii).

† Substituted by Act LXVIII of 1976, S. 7 for "two years".

‡ Substituted by the Marriage Laws (Amendment) Act, 1976, S. 7 "for bestiality".

“(ii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act 1956, or in a proceeding under section 125 of the Code of Criminal Procedure, 1973, (or under the corresponding section 488 of the Code of Criminal Procedure, 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not)²² was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.—This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976.]

Section 13—Synopsis.

A. COMMON TO BOTH SPOUSES

1. Divorce.
2. Special Marriage Act and dissolution of Hindu Marriages.
3. Voluntary sexual intercourse.
4. Cruelty.
5. Desertion.
6. Conversion to another religion.
7. Insanity of unsound mind, etc.
8. Virulent and incurable, leprosy.
9. Venereal disease.
10. Renunciation of the world by entering a religious order.
11. Not been heard of as alive.

12. Non-resumption of cohabitation after judicial separation or decree for restitution of conjugal rights.

B. GROUNDS AVAILABLE TO WIFE ADDITIONALLY

13. Husband remarrying.
14. Rape, sodomy or bestiality.
15. Non-cohabitation after decree for maintenance.
16. Repudiation of marriage by wife married before attaining 15 years.

C. MISCELLANEOUS

17. Certain procedural matters.

1. **Divorce.**—Marriage under textual Hindu law was primarily and essentially a sacrament. It was regarded not only as a union of two bodies but also of the souls in them. The textual Hindu law did not permit dissolution of marriage. The Hindu Marriage Act created apropos marriage a relation and status, not defined by contract but by law. It has provided for legal dissolution of marriage.^{22a} So long as such a divorce has not been obtained by one of the two parties on presentation of a petition from a competent Court the marriage subsists and a second marriage cannot be contracted.^{22b} Section 29 (2) saves the right of dissolution of marriage recognised by any custom or conferred by any special enactment such as section 5 of the Travancore Nair Act which is not repealed by section 30 of the Hindu Marriage Act. But this does not mean that a Hindu Marriage cannot be dissolved under Section 13 of the latter Act or that the only remedy of the parties is under section 5 of the Travancore Nair

^{22a} Clauses (ii) and (iv) inserted by the Marriage Laws (Amendment) Act, 1976, Section 7

(236) *Rajaram v. Deepakshi*, 1974 M.P. 32.

(237) *Rajwar Singh v. Rajam Kaur*, 1965 AIR 464 (F.B.).

Act.²⁵⁸ The grounds here mentioned cannot be added on to some notions of the interest of the party or the society (*Dwarika Bai v. Naiman Mahant*²⁵⁹) such as incompatibility of temperament or that it would be better for all concerned (*Usher v. Usher*²⁶⁰).

Divorce, under the Act, as at present reflects in the main three categories of grounds. The first is the traditional theory of matrimonial fault [basing divorce on matrimonial offence, giving the right to the innocent party to apply for relief and vesting discretion in the Court to grant relief]. The second is the theory of frustration by reason of specified circumstances. The third is the theory of consent. There is however, no theory of the breakdown of the marriage except to a limited extent.²⁶¹ [See section 13(1-A).] Apropos the last theory, it was observed in *Parthar v. Parthar*,²⁶² "a marriage in which the parties could no more live together deserved to be dissolved. But there is no provision in the Act that a marriage which has broken down irretrievably should be dissolved" In England irretrievable breakdown of the marriage as the sole ground for divorce was introduced by the Matrimonial Causes Act, 1973.

2. Special Marriage Act and dissolution of Hindu marriages.—Two Hindus may have married under the Special Marriage Act, or they may have married under the Hindu Marriage Act and registered the marriage under section 15 of the Special Marriage Act, or they may have married under the Hindu Marriage Act and not registered it under the Special Marriage Act, or they may have married under the traditional sastric law. In the first case relief of divorce will have to be sought only under the Special Marriage Act. [See Section 29 (4), Hindu Marriage Act.]

In the second case, as a consequence of registration, the marriage will be deemed to be a marriage under the Special Marriage Act; hence relief of dissolution has to be sought only under that Act. In the last two cases, *prima facie* the matter concerns the Hindu Marriage Act or the traditional sastric law as the case may be. An observation A.N. Modi, J., in *C.A. Nalakantan v. Mrs. Anne Nalakantan*²⁶³ would seem to suggest that even in these cases divorce could be granted under the Special Marriage Act. The case before the learned Judge was that of a man who had married a Christian woman in England seeking dissolution under section 27 of the Special Marriage Act. In that context referring to the Preamble to that Act which reads: "An Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce". Modi, J., observed "It may also be pointed out in this connection that the Preamble to the Act shows that so far as divorce is concerned, the Act is all-embracing and would govern the dissolution of all marriages irrespective of the consideration whether the marriage is of the special form envisaged under the Act and whether it has been registered under the Act or not". An argument may be founded on this dictum that the parties though married under the sastric Hindu law or after

(258) 1951 Ker 311 (F B)

(259) 1953 M 792

(260) 1941 R 221

(261) See Law Commission, 71st Report

(262) 1978 Raj 140 at 154. See also *Mohinder Pal v. Kulwant Kaur*, 1976 Delhi 141.

(263) 1959 R J 133.

the commencement of the Hindu Marriage Act, can yet at their choice seek dissolution of their marriage under the Special Marriage Act even if the marriage had not been registered under that Act. Such an argument however, is not acceptable. The Preamble sets out only the goals. Operative force has to come from the body of the Act and there is no section expressly or by implication conferring power to grant divorce in respect of marriages not performed under the Act except where they have been registered under the Act.

3. Voluntary sexual intercourse.—This clause lays down as a ground for divorce the respondent's voluntary sexual intercourse with another after the solemnisation of the marriage. The person with whom the sexual intercourse was had may be a virgin or a married woman or she may be a public woman or one who though married is immoral: *Olga Thomas Gomes v Mark Gomes*²⁶⁴. It must be noticed that what is made a ground is voluntary sexual intercourse and not being merely familiar or intimate with another even to an indecent degree which falls short of sexual intercourse. Intercourse implies the consent of both parties to the act, and the fact that the respondent was raped by another against her consent or by mistake as for instance in the dark she had intercourse with another under the impression that that other was her husband, or she was made to agree to the act by her doctor under the belief that it was an operation, or when it was done under anaesthetic which made her insensible to the act, etc. In other words it must have been a willing and a knowing act consented to by the respondent in violation of the matrimonial obligation not to have sexual intercourse with any other than the spouse. Sexual intercourse must show penetration, and mere kisses, huggings and embraces and even an attempt at sexual intercourse which did not succeed due to any of the imaginable reasons would not amount to a valid ground under this clause.

Sex loyalty to the spouse in a single loyalty and cannot admit of division or duality. Besides, adultery implies a penetrative sexual intercourse, and if there is no penetration to any degree but a mere attempt at sexual intercourse it is not sufficient to constitute adultery. No doubt, the sexual intercourse need not be complete, but penetration is necessary either to a smaller or larger degree. As was held in *Dennis v. Dennis*²⁶⁵, adultery cannot be proved unless there be some penetration though it is not necessary that the complete act of sexual intercourse has taken place. If there is the penetration by the man of the woman, adultery may be found, but if there had been no more than an attempt at the operation a finding of adultery would not be correct. In the above case, it was further laid down that if a man and a woman who were attached to each other went to the woman's bedroom and took off the greater part of their clothing and lay on the bed together, there would arise in most cases a presumption of adultery which it would be extraordinarily difficult to rebut. But this inference was capable of being rebutted if it was found that at the time at which the two were together on the bed, the man was impotent in regard to the woman and was unable to get an erection with the consequent inability to penetrate the woman to any degree, with the result that the adultery would not be held to have been proved.

Ground of relief under this clause is known as adultery in matrimonial law. The clause however does not use the term 'adultery'. Even a single act of sexual intercourse subsequent to the solemnisation of the marriage by the respondent with a person other than his or her own spouse will now be enough to sustain a case²⁶⁶ for divorce under this clause or judicial

(264) 61 Cal. W.N. 395.

(265) (1955) 2 All E. R. 51.

(266) See *Mahalingam Pillai v. Amrovali*, (1956) 2 M.L.J. 289.

separation under section 10 (1). Section 125 (a) of the Criminal Procedure Code, 1973, provides that a wife's claim for maintenance under that section may be refused if at the time the claim is made she is "living in adultery".

The words 'living in adultery' mean a continuous course of adulterous life as distinguished from one or two lapses from virtue, *Vallammai Achi v. Singaram Chettiar*.²⁶⁷

While the finding of the respondent's wife in the company of a person other than her husband having been dragged by him into a shed by holding her hand would not amount to having sexual intercourse with any person other than her husband²⁶⁸ if an unrelated person is found alone with a young wife after midnight in her bedroom in actual physical juxtaposition, that circumstance unless explained in manner compatible with innocence would justify inference of adultery.²⁶⁹

Besides, adultery cannot be said to have taken place by reason of the sexual intercourse had by either spouse with a stranger when the intercourse had taken place either by coercion or fraud or mistake. If the respondent *bona fide* believed that the person with whom he or she had intercourse was the petitioner—such a thing is possible in cases of sexual intercourse occurring in masquerades—no adultery can be said to have been committed. Nor can sexual intercourse be held to have taken place where the spouse was forced to it in the sense of rape having been committed. Sexual intercourse, as it implies from the expression intercourse, must be bilateral and consensual. If the spouse who is charged with adultery by reason of sexual intercourse with a non-spouse had been the victim of rape in the circumstances in which she could not but submit to the intercourse by reason of the force executed by the other party to the action, there is no willing sexual intercourse which is an ingredient of adultery *Mahabangam Pillai v. Annaswami*.²⁷⁰

The sexual intercourse had by the respondent with a stranger need not have been committed within India, and though the operation of the Act is confined to India, the fact that one of the grounds for the relief had its habitat outside India does not prevent a petition being presented in India for the necessary relief based upon that ground, *Gerald v. End*.²⁷¹ Adultery committed before marriage is not a ground for relief *Coleman v. Coleman*.²⁷²

Proof of sexual intercourse.—Adultery is generally proved by presumptive proof based upon (a) circumstantial evidence, (b) evidence of non-access and the birth of children, (c) contracting venereal diseases, (d) by evidence of visits to houses of ill-repute, (e) decesses and admissions made in previous proceedings, and (f) confessions and admissions of the parties which however are rarely acted upon in the absence of corroboration. That the respondent had sexual intercourse with another may be proved not only by direct evidence but also by such circumstantial evidence as convinces a reasonable man of its having taken place. In fact

(267) (1966) 2 M.L.J. 425.

(268) *Sadha Arma v. Sanyamaryana*, (1967) 1 An. W.R. 179.

(269) *Subba Ramo Reddiker v. Saravasthy*, (1966) 2 M.L.J. 363; 1967 Mad. 83. Cf., *Chandra Mahini v. Anand*, 1967 S.C. 584 (mere fact of male relation writing improper letters to a married woman does not necessarily prove illicit intimacy between them).

(270) (1956) 2 M.L.J. 289

(271) 45 Cal.W.N. 249.

(272) (1953) All E.R. 617

adultery is seldom susceptible of proof except by circumstances which would lead to that conclusion. The birth of a child to the wife when there was no access to her by the husband during the possible period of conception show the adultery of the wife: *Anthony v. Mary*.²⁷³ Mere suspicion and opinion cannot take the place of proof and there must be evidence to show not only opportunity to commit the adultery, but also desire or inclination to commit it. *Mahalingam Pillai v. Amsanalli*.²⁷⁴ In the American Jurisprudence, Vol. 17 the following paragraphs occur which bear upon this question:

"The intent and disposition of the parties towards each other give character to their relations and can be ascertained only from acts and declarations of the parties. It is true that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may, and ordinarily do, extend over a period of time both prior and subsequent to it. The rules governing human conduct and known to common observation and experience are applied in these cases as in all other investigations of fact. Thus, it is a general rule that evidence having a logical tendency to prove an adulterous disposition or infatuation between the defendant and his or her alleged paramour is admissible. This rule admits evidence of acts both prior and subsequent to the adultery charged, even including acts with the alleged paramour occurring prior to the marriage of the parties. The limitation of the rule is that the acts sought to be shown must be sufficiently significant in character and near enough in point of time to lead the guarded discretion of a reasonable and just man to a belief in the existence of this important element in the ultimate fact to be proved. An adulterous disposition existing in two persons towards each other is commonly of gradual development; it must have some duration and does not suddenly subside. When once shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties. It is this character of permanency which justifies the inference of its existence, at any particular point of time, from facts illustrating the preceding or subsequent relations of the parties. Evidence of the husband's commands to the wife prohibiting her association with the alleged paramour in the presence of a third person and of her clandestine violation of the command has been held admissible as tending to show her infatuation with the alleged paramour. According to the weight of authority, however, evidence of immoral or indiscreet conduct on the part of the defendant with men other than those with whom adultery is directly charged is not admissible although there is authority to the contrary.

In the absence of statutory provisions to the contrary, the admissions of the defendant would be competent to prove adultery on his or her part, although such proof alone without corroboration may not be sufficient. In some instances, the statutes have provided expressly or in effect that the declarations or confessions of neither party shall be received in evidence to prove the adultery. Such construction has been given to a statute prohibiting the entry of decrees of divorce *pro confesso* or by default. On the other hand, the object of statutory restrictions on the admissibility of such declarations and confessions has been said to be the exclusion of confidential communications between husband and wife and of declarations by either that may have originated in a conspiracy between them to manufacture or furnish evidence sufficient to warrant a decree of divorce. It would seem that when there is no danger of opening the door for collusive testimony, admissions by either the husband or the

²⁷³ 1 L.R. 62 Cal. 1080.

²⁷⁴ 1946 2 M.L.J. 389.

wife to or in the presence of third parties are admissible, especially when connected with other evidence of improper relations. Thus, it has been held that the testimony of a third party as to the request of the wife to be allowed to pay the costs of a prosecution against her alleged paramour is admissible, not as a confession of her guilt, but as a circumstance tending to show her interest in, and association with him, and to corroborate other testimony as to adulterous intercourse with him.

The admissions and confessions of the paramour not made in the presence of or communicated to, the defending spouse, are not admissible to prove his or her adultery, although they have been held competent where the foundation indicated was laid."

The onus of proof is on the person alleging adultery.²⁷⁴ The early view was (but not now) that proof should be proof beyond reasonable doubt.²⁷⁵ Proof beyond reasonable doubt is a requirement of criminal law, and even there it is only a guide line and not a fetish.²⁷⁶ Direct proof however is not an imperative.²⁷⁷ It is highly improbable that any person could be witness to such act; hence direct proof will be very rare and even if forthcoming the Court would regard it with disfavour.²⁷⁸ Normally adultery is expected to be established by circumstantial evidence. It is not possible to lay down a rule of thumb as to what circumstances would be sufficient to establish adultery. The only general rule is that the circumstances must be such as would lead to a guarded judgment of a reasonable and just man to that conclusion. The Court would not as a general rule infer adultery from evidence of opportunity alone but would require some more satisfactory proof.²⁷⁹ Evidence of a guilty inclination or passion is needed in addition.²⁸⁰ To establish adultery it is not necessary to prove the direct fact or even an act of adultery in time and place, or even necessarily the name of the person with whom the respondent is alleged to have committed adultery.²⁸¹ The birth

(275) See *Chander Prakash v. Sushil Kumari*, 1971 Delhi 206; *Champa Gouri v. Jaganadas Amichand*, (1971) 1 A.P.L.J. 230.

(276) See *Bijin Chandra v. Prabhmati*, 1957 S.C. 176; *Vandergaule v. Boly Ammal*, 1965 Mad. 29; *Bhagwan v. Sanku Ram*, 1961 Punj. 101; *Harish Chandra v. Rama Gouri*, 1969 B.L.J.R. 999; *Narayanan v. Perakutty*, 1973 Ker. L.J. 80; 1973 Ker. L.J. 120; *Kushikaman v. Malin*, 1973 Ker. L.T. 431; *Chhaganlal v. Sakshi Devi*, 1975 Raj. 8. Cr., *Widhe v. White*, 1958 S.C. 441 (case under the Divorce Act). Cf., however *Pran Math v. Kumbhari Bai*, 1974 M.P. 89 (case under the Divorce Act), holding that the view that the standard of proof required in order to be satisfied in proof beyond reasonable doubt does not now hold the field and the civil standard of proof alone will have to be applied now, in view of the changed interpretation of the law in England in *Blyth v. Blyth*, (1966) 1 All E.R. 524. Cf., also *Champa Gouri v. Jaganadas Amichand*, supra holding that adultery must be proved by a preponderance of probability and *Dr. N.G. Dasgupta v. Mrs. S. Dasgupta*, 1975 S.C. 1584; *Sipem Narain v. Shell*, (1978) 4 A.L.J. 882

(277) *Jinder Singh v. Tejo Sates*, (1979) 2 S.C.J. 10, 11.

(278) *Chandra Mohini v. Arinath*, 1967 S.C. 384; *Vedantathi v. Ramaswamy*, 1964 Mys. 280, *Dnyand v. Kanchilal*, 1963 Bom. 90.

(279) *Simen Lakru v. Bala*, I.L.R. 11 Pat. 627; *Phillips v. Emperai*, 1925 Oudh 308.

(280) *Pachpa Devi v. Radhakrishnam*, 1972 Raj. 260, *Chhaganlal v. Sakshi Devi*, supra. See further, *Subbarayan Reddy v. Saravathi*, 1967 Mad. 85; *Pattayya v. Manickam*, 1967 Mad. 254; *Barber v. Barber*, 1953 M.B. 105; *Hartley v. Hartley*, 1951 Oudh 259.

(281) *Champa Gouri v. Jaganadas Amichand*, supra.

(282) *Champa Gouri v. Jaganadas Amichand*, supra; *Barber v. Barber*, supra; *Hartley v. Hartley*, supra.

of a child 11 months and 20 days after final parting company with husband would go a long way to establish adultery on the wife's part²⁸². Likewise the birth of a child 402 days after final severance of ties was proof that the child was born only as a result of the wife's sexual intercourse with someone other than the husband and no other evidence is needed to prove this.²⁸⁴

In *Tribhul Singh v. Vimla Devi*,²⁸⁵ the facts found were that the wife had been frequently absenting herself from her house for days at a stretch and during such periods of her absence was found in company with a total stranger and no explanation had been forthcoming for the woman being found in the stranger's company at several places, and it was held that these facts would be consistent with a finding that she had been living in adultery with that man. The degree of proof need not reach certainty but must carry a high degree of probability: *Baby Asmat v. Yadarajulu*.²⁸⁶ *Vina Reddi v. Kistamma*²⁸⁷ (proof beyond reasonable doubt does not mean proof beyond a shadow of doubt or that it should reach certainty reversed by Supreme Court on another point).

Plea of non-access should be specifically taken in pleadings; admissions or statements by the wife made in an unguarded moment cannot be flung at her at the time of argument²⁸⁸. Evidence on the point by the spouses is admissible,²⁸⁹ but should be considered with caution, with a lynx-eye.²⁹⁰

An application for dissolution of marriage is straightaway maintainable on the ground of adultery without need for a prior decree for judicial separation²⁹¹.

Cohabitation with the respondent at different places subsequent to knowledge by the petitioner of the alleged adultery would, in the absence of proper explanation of the petitioner's conduct amount to condonation disqualifying the petitioner to relief²⁹².

Where a husband against whom a decree for judicial separation has been passed at the instance of the wife, commits adultery, subsequently, the wife is entitled to a decree of divorce on the ground that the husband has been living in adultery *Gwen v. Gwen*²⁹³. The judicial separation does not amount to an immunity for matrimonial offence and it is no argument for the respondent to urge that he or she being separated under an order of judicial separation, the petitioner ought not to bother as to how the respondent conducts himself or herself.

(283) *Kamlesh Kumari v. Balbir Singh Badi*, 1973 P. & H. 152.

(284) *Vina Reddi v. Kistamma*, 81 L.W. 490; 1969 Mad. 235; (1969) 1 M.L.J. 366.

(285) 1959 J. and K. 72.

(286) (1969) 82 L.W. 18.

(287) 81 L.W. 490; 1969 Mad. 235; (1969) 1 M.L.J. 366.

(288) *Anandi Devi v. Rajaram*, 1973 Raj. 74.

(289) *Vina Reddi v. Kistamma*, *supra*.

(290) *Dwarkan Bai v. Nayana*, 1953 Mad. 792.

(291) *Aspinu v. Bhagaban*, I.L.R. (1971) Cut 1447; 1972 O'ria 153; *Suzila v. Gopabhatraiah Prabhu*, 1975 Ker. L.T. 72.

(292) *Jagan Mahan Rao v. Swapna*, (1972) 2 M.L.J. 77; 85 L.W. 484.

(293) L.R. 3 Prob. 121.

The petitioner for a decree of divorce is expected to come with clean hands, and the question may therefore arise if he or she has been guilty of adultery, whether a petition on the ground of respondent's adultery should be viewed with favour. The answer is provided by section 23 (1) (a) which vests a discretion in the Court to consider all the circumstances of such a case and see if the petitioner should be given the relief. No doubt, there is no express provision in the Act and certainly not in this particular section to the effect that the petitioner who is guilty of adultery cannot submit a petition for divorce against the respondent. But the wide and comprehensive qualification embodied in section 23 (1) (a) will meet the justice of any particular case.

4. Cruelty.—General Cruelty simpliciter is *not* a ground for divorce as well as judicial separation. Prior to the Marriage Laws (Amendment) Act (LXVIII of 1976) cruelty was not a ground for divorce but under Section 10 (1) (b) of the 1955 Act prior to the Amending Act of 1976 it was a ground for judicial separation provided it was such "as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party. Under the Act it is not further necessary to show that such injury should be to the health, life or limb, bodily injury or harm. It may include cases other than that of injury and harm to one's body, limb or health. It may be harm to reputation or social position"²⁹⁴. The conduct complained of must be much higher than the ordinary wear and tear of married life²⁹⁵. Now both as a ground for divorce as well as a judicial separation, cruelty in its universality has been brought in. It is difficult to define what constitutes cruelty in all cases, and each case has to be judged on its own facts and circumstances, having regard to the conduct of the parties, their previous relations to each other, their status in life, the particular acts of cruelty alleged and the causes that precipitated it, the state of health of the parties and numerous features which cannot be brought in and confined to an exclusive and inclusive definition. In view of this difficulty of defining cruelty, the Courts have generally confined themselves to the task of determining whether the facts in the particular case in question constitute cruelty. This, however, does not mean that one cannot broadly indicate what may or may not amount to cruelty, all the while remembering that the same set of facts may amount to cruelty in the background of the relations between the parties in a particular case while in another set of circumstances those facts may fall below the requisites warranting the conclusion of cruelty. Generally there must be an intention to cause suffering to the other spouse. The concept of cruelty has varied from time to time, place to place, individual to individual in its application according to the social status of the parties and their economic conditions etc culture, temperament, status in life are factors to be considered²⁹⁶. Cruelty in matrimonial law may be of infinite variety. It can be subtle or brutal. It may be physical or mental. It may be by words, gestures or by mere silence, violence or non-violence²⁹⁷. The question of cruelty must be determined from the whole facts and the matrimonial relations between the spouses. It must be determined as a cumulative effect of all the circumstances.²⁹⁸ The question of cruelty is to be judged on the basis of the evidence on record and the totality of the circumstances of the case²⁹⁹.

(294) *Suzela v Gopalakrishna Prashu*, 1975 Ker. L.T. 72.

(295) *Parthar v Parthar*, 1978 Raj 140.

(296) *Jia Lal Abrol v. Sarla Devi*, 1978 J and K 69.

(297) *Dr. Narayan Ganesh v. Mrs. Sucheta*, I.L.R. (1969) Bom. 1024; 71 Bom L.R. 569; 1970 Bom. 312.

(298) *Sreepadachar v. Pasantha Bai*, 1970 Mys 232.

(299) *Neera v. Kishan Sagar*, 1975 All 937.

In cases of cruelty corroboration is generally expected.³⁰⁰ This is afforded by evidence of relations, friends, doctors and neighbours who have seen the external manifestations.³⁰¹

To prove cruelty there should be a reasonable apprehension that it will be harmful to live with the other spouse.³⁰² Proof of motive or intention to be cruel is not necessary.³⁰³ An unfounded or imaginary apprehension will not do. It must be reasonable in the sense that the spouse, circumstanced as he or she is will as a reasonable person entertain the fear of such injury or harm. In *Russell v. Russell*,³⁰⁴ the majority of the Law Lords define legal cruelty as conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. The English definition of 'cruelty' was held to be inapt in a case under Section 10 (1) (b) of the Hindu Marriage Act, 1955 because of the departure from the language of the definition in English decisions as to what amounts to cruelty.³⁰⁵ What the Courts must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law but whether the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in that person's mind that it will be harmful or injurious for the person to live with the respondent.³⁰⁶

Acts of cruelty must be specifically pleaded. Allegations generally of nagging, neglect and assault will not be enough. Specific instances of the conduct should be described in the particulars.³⁰⁷ The question of legal cruelty can be considered under the following headings:

- (a) *Actual or threatened physical violence.*—Actual violence or threat of such violence of such a character as to give rise to an apprehension of danger to life, limb or health will undoubtedly constitute cruelty. Mere slight acts of violence which any spouse may commit in anger or worry cannot be a ground for holding that legal cruelty exists. Though ordinarily a single act of violence ought not to justify a charge of cruelty,³⁰⁸ it is not an invariable rule as it is possible in particular circumstances even for a single act of a grossly violent character being held to constitute legal cruelty. Cruelty by physical violence can be committed both by the husband and wife, though cases of cruelty by the wife must in the nature of things, be rare. Cruelty does not lie in merely beating the spouse.³⁰⁹

(300) *Yadrai v. Sunderbar*, 1969 Guj. 21

(301) *Frounhold v. Frounhold*, (1952) 1 T.L.R. 1522, 1527.

(302) *Stuart v. Stuart*, 1926 Cal 864.

(303) *Thimbat v. Kamudani*, 1937 Bom. 80.

(304) 1897 A.C. 393. See also *Ramesh Chandra v. Nandini*, 1974 (1) C.W.R. 593.

(305) *Susela v. Gopalabhishta Prabhu*, 1975 Ker. L.T. 72; *Dr. N.G. Dasgou v. Mrs. S. Dasgou*, 1975 S.C. 1554.

(306) *Dr. N.G. Dasgou v. Mrs. S. Dasgou*, *supra*

(307) See *Garten v. Garten*, (1962) 3 All E.R. 41; *Perr v. Perr*, (1968) 1 W.L.R. 98.

(308) *Pranab Bismis v. Minakpoo Dasgou*, 1976 Cal. 136 (single act followed by remorse insufficient)

(309) *Jaganmohan v. Sanjivramdas*, (1972) 2 An. W.R. 200; 1972 A.P. 377.

- (b) *Verbal abuse and insults.*—The continual use of abusive and insulting words spitefully indulged into bring shame and mental agony to the other spouse which will tend to undermine the health of that spouse may in the circumstances of any particular case amount to legal cruelty. Mere trivial incidents which are merely the wear and tear of married life do not constitute cruelty. *Thompson v. Thompson*.⁽³¹⁰⁾ Using foul and abusive language to the husband and his parents and picking up quarrels tending to disturb husband's mental peace amounts to cruelty.⁽³¹¹⁾
- (c) *Excessive sexual intercourse.*—Demand by the husband of excessive sexual intercourse and compelling the wife to submit to it against her wish and despite her remonstrance resulting in the impairment of her health will amount to cruelty.⁽³¹²⁾
- (d) *Refusal of intercourse.*—The question whether refusal of reasonable intercourse will amount to legal cruelty depends upon the facts of each case. Sexual intercourse is one of the objects of marriage and if that is unreasonably refused and the refusal is persisted in for a long time, it will be ground for holding that there is legal cruelty. Mere refusal or sexual intercourse is not *per se* cruelty.⁽³¹³⁾ But persistent refusal would amount to cruelty.⁽³¹⁴⁾ What has to be found in each case is whether the act is such which the complaining partner should not be asked to endure.⁽³¹⁵⁾
- (e) *Neglect.*—Neglect by the spouse in the discharge of his or her duties of attention and company to the other and forcing the latter to leave the home on account of such neglect would in the circumstances of any particular case constitute neglect amounting to cruelty. Incompatibility of temperament, neglect etc., will not amount to cruelty.⁽³¹⁶⁾ But neglect and coldness which affected the health of the wife, and which, if continued would have produced melancholia will amount to cruelty.⁽³¹⁷⁾ Desertion for a period of less than two years immediately before the presentation of the petition by itself will not constitute cruelty.⁽³¹⁸⁾
- (f) *Communication of venereal disease.*—It is well-settled that a spouse who knowing that she or he is afflicted with venereal disease has sexual intercourse with the other is guilty of cruelty.
- (g) *Drunkenness and use of drugs.*—Drunkenness and intemperance and violent behaviour due to use of drugs may not in themselves constitute cruelty, but if they result in violent acts injurious to the health, whether mental or physical,

(310) (1957) 1 All. E.R. 161.

(311) *Kamla Devi v. Balbir Singh*, 1979 J. & K. 4; Cf., *Manjulebi v. Ramachandra*, 1975 M.P.L.J. 642; *Dr. N.G. Dastar v. Mrs. S. Dastar*, 1975 S.C. 1534; *Syedpachar v. Fozaila Bai*, 1970 Mys. 232.

(312) *Kumari Lata v. Kamla Prasad*, 1965 All. 280. See also *Halsam v. Halsam*, 1947 W.N. 70.

(313) *Weatherly v. Weatherly*, (1947) 1 All. E.R. 513.

(314) *Nighawan v. Nighawan*, 1973 Delhi 200.

(315) *Ibid.*

(316) See *Baibler v. Baibler*, (1947) 1 All. E.R. 519; See also *Dr. N.G. Dastar v. Mrs. Dastar*, *supra*.

(317) *Kamulebi v. Ramachandra*, 1965 Mad. 88; *Weatherly v. Weatherly*, *supra*.

(318) *Kamulebi Devi v. Pijoy Singh*, 1973 Raj. 308.

of the other spouse, then the protection of the Court is to be rendered by judicial separation: *Baker v. Baker*.³¹⁹ In all these cases the Court should not jump to the conclusion that mere addiction to the vice of drink or drug must necessarily result in the cruelty to the other spouse as cases are not infrequent of such addicts getting on very well with their spouses despite such addiction.

- (h) *Refusal to speak*.—Where one of the spouses though living under the same roof refuses to speak to the other for a considerably long time and on that ground the other spouse becomes wretched and worried, such conduct may be a ground for holding that there has been cruelty on the part of the spouse who refuses to speak. This conduct must no doubt be taken along with other circumstances of the case to come to the conclusion that cruelty has been established.
- (i) *Forcing association with improper persons*.—Each spouse is entitled to have the sanctity of the marital bed preserved unalloyed by intrusion of strangers, and if either introduces such strangers to share the life of the home and the conjugal society of the other as, for instance, by the husband inducing his wife to have intercourse with a stranger or inducing her to put up with a lewd woman whom he has brought into her room for his carnal satisfaction, the wife is entitled to resist all such immoral attempts by filing a petition for judicial separation on the ground of cruelty.³²⁰
- (j) *Pseudo charge of immorality against the wife*.—Where a husband falsely charges his wife with immorality and adultery and persists in such charge, there can be no doubt that the wife must necessarily take it to her heart unless she is too thick-skinned to mind it. Normally such charges if persisted in would undermine the health of any decent woman and would support her claim for relief: *Iqbal Kaur v. Pritam Singh*,³²¹ *Kuppaswamy Goundan v. Alagammal*,³²² *Umribai v. Chittar*.³²³ See also *Smt. Bhago v. Bant Singh*;³²⁴ *Norra v. Kishan Suresh*;³²⁵ *Shyam Narayan v. Shalea*.³²⁶ [falsely alleging that wife had married again and was living in adultery].
- (k) *Ill-treatment of children*.—Deliberate and designed ill-treatment of the children in the presence of the mother with a view to give her pain carried to such an extent that it has affected her health and anguished her mind will amount to legal cruelty. This kind of indirect cruelty is termed constructive cruelty in *Cramford v. Cramford*.³²⁷ It is held that in the case of an alleged cruelty which

(319) (1955) 3 All E.R. 199.

(320) *Lalita Devi v. Radha Mohan*, 1976 E.R. 1.

(321) 1968 P.M.J. 242.

(322) 1961 Mad. 391.

(323) 1966 M.F. 205.

(324) (1972) 76 P.M.J. L.R. 71.

(325) 1976 A.L. 337.

(326) (1976) 4 A.L.R. 922.

(327) (1869) 3 All E.R. 362.

is not physical violence it is impossible to say whether any class of conduct is cruelty or cannot be cruelty. Cruelty may be inferred from the whole facts and atmosphere disclosed in the proof, and it is a wrong approach to put the various acts or conduct alleged into a series of separate comparisons and say of each of them that they by themselves cannot pass the test of cruelty and therefore that totality cannot pass that test. Though actual intention to injure the wife in a case of mental cruelty must be important, and may be decisive in the particular case, it is not an essential factor.

- (i) Wife's association persisted in with another woman, raising suspicion of her practising lesbianism: *Spicer v. Spicer*.³²⁸

Unhappiness in a marriage *per se* does not amount to cruelty.³²⁹ Unruly temper of a spouse or matrimonial wranglings cannot amount to cruelty nor would it be sufficient to show that the other spouse is whimsical, exacting, inconsiderate and irascible. Incompatibility of temperament, negligence or want of affection wounding the feelings of the other or expressions of hatred or the like would not, by themselves be cogent grounds for relief. Meanness, stinginess, shiftlessness, selfishness or defects of temperament cannot by themselves amount to cruelty. These must ordinarily be accepted for better or for worse.³³⁰ Habitual nagging by the mother-in-law too frequent to be tolerated leading to constant dissatisfaction and mental torture would amount to cruelty.³³¹

In an application for restitution of conjugal rights by the husband, the wife may plead legal cruelty in defence by expressing a fear that if she returns to her husband there would be the exercise of tyranny by him subjecting her to constant insults and abuses and accusation of adulterous conduct which would make the state of married life impossible to be endured causing a very unhappy and miserable state of existence. This is cruelty of a kind worse than that of physical violence. *Susanamma Kurian v. Varghese Abraham*.³³²

In one case the Kerala High Court observed: The general rule in all questions of cruelty is that the whole matrimonial relations of the parties should be considered especially when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. Any conclusion with reference to the charge of cruelty alleged must be reached only after a consideration of the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from that point of view. In determining the question regard must be had to the circumstances of each particular case, keeping away in view the physical and mental condition of the parties and their character and social status. Whatever might have been the view in the past, the present tendency is in favour of the view that any conduct of the husband which causes disgrace to the wife and annoyance and indignity amounts to legal cruelty. The harm apprehended may be mental suffering as distinct from bodily injury, for pain of mind may be even more severe than bodily pain, and a husband disposed to evil may create more

(328) (1954) 3 AIL E.R. 206.

(329) *Ramesh Chandra v. Nandita*, (1979) 47 Cut. L.T. 135 1979 (1) C.W.R. 17.

(330) *Ibid.*

(331) *Rabindranath v. Premila Bala*, 1979 Orissa 85.

(332) 1537 T.C. 277.

miserly in a sensitive and affectionate wife by a course of conduct addressed only to the mind than if in fits of anger he were to inflict occasional blows upon her person *Sarah Abraham v. Pye Abraham*,³³³ *King v. King*.³³⁴ Likewise the Calcutta High Court has pointed out that cruelty may be mental such as indifference and frigidity towards the wife, or physical like acts of violence and abstinence from sexual intercourse without reasonable cause. There are two sides to be considered in a case of cruelty, from the petitioner's side, ought this petitioner to be called upon to endure the conduct from the respondent's side, was this conduct excusable? The Court has then to decide whether the sum total of the reprehensible conduct was cruel.³³⁵ The question of mental cruelty should be decided in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status of the parties, their environment etc.³³⁶ In *Siddagangappa v. Smt. Lakshminamma*,³³⁷ it is held that wilful and unjustifiable interference by one spouse in the sphere of the life of the other is one species of cruelty in the same way in which rough or domineering conduct or unnatural sexual activities or disgusting accusation of unchastity or adultery and sometimes even studied unkindness or persistent nagging in a proper case can be regarded as cruelty. Cruelty about which the Act speaks is not restricted to acts of physical violence and may extend to behaviour which may cause pain and injury to the mind as well and so renders the continuance in the matrimonial home an agonising ordeal.

Where the wife left her husband's house leaving a two months' old child and went to her parent's place and when approached not only refused to return to the husband's house to live with him but also refused to keep the child as a result of which the child died, the attitude of the wife amounted to cruelty entitling the husband to a decree of divorce on the ground of cruelty.³³⁸

The mere fact that in a prior suit for maintenance by the wife on the ground of cruelty there was a compromise and the wife agreed to go back to the husband and live with him does not prevent the Court in a subsequent petition based on cruelty to consider the prior acts of cruelty and that the compromise was a kind of provisional arrangement in an attempt to see whether an amicable matrimonial life was possible. The prior compromise and conduct would not amount strictly to such a condonation of the offence as to preclude the Court from finding cruelty for ordering judicial separation based on the fresh evidence taken along with the evidence of conduct of the husband prior to the compromise. *Jeyaratnammal v. Srinipasa Mudaliar*.³³⁹

Cruelty during separation.—Even when the parties are living separately it is possible for either party to commit acts of cruelty on the other, as for instance in *Britt v. Britt*.³⁴⁰

(333) 1959 Ker. 75; I.L.R. (1958) Ker. 643.

(334) (1952) All E.R. 584.

(335) *Jyoti Chandra Gube v. Mayra Gube*, 1970 Cal. 226.

(336) *Bijoli v. Subramo*, 1979 Cal. 87.

(337) 1968 Mys. 113.

(338) *Gurcharan Singh v. Sukhdev Kaur*, 1979 P. & H. 98.

(339) 1964 Mad. 482.

(340) (1955) 3 All. E.R. 768.

In that case the wife and the husband were living separately and several months after such separation the husband visited the matrimonial home where the wife was living and gave her a good beating as a result of which she got black eye and again hit her when he subsequently met her in an omnibus. It was held that these acts were sufficient to establish cruelty even though they were committed when the parties were living apart.

Cruelty by refusal to have children.—Permanent and unreasonable starvation of the maternal instinct in the wife to have children, by the husband deliberately and without good reason, permanently denying his wife of a fair opportunity of having a child, by his practice of *coitus interruptus*, a course which, while preserving to himself a measure of sexual enjoyment, is a deliberate act contrary to the laws of nature and one which any reasonable husband must realise is likely to affect the wife's health, is cruelty: *Knott v. Knott*³⁴¹. Similarly in *Forbes Forbes*³⁴², where a wife deliberately and consistently refused to satisfy the husband's craving to have children by insisting on the use of contraceptives and it was found that the wife was not unfit for child birth and that this intentional and persistent conduct on her part had caused the husband anxiety and misery resulting in his mental ill-health to the knowledge of his wife, it was held that the wife was guilty of cruelty to her husband. To the same effect is the decision in *Ward v. Ward*³⁴³.

Cruelty by words.—It is implicit in law that in order to find cruelty proved, it is not necessary to find physical violence. Cruelty by words, by talk, or by conduct other than violence may be cruelty nonetheless and possibly may even be more dastardly cruelty than the cruelty of blows. Nagging will suffice if persistent. Abuse, harsh language, conduct of that kind may well be cruelty provided always it causes either injury to health or a reasonable apprehension thereof. In order to establish cruelty it is essential to judge every act in relation to its attendant circumstances, the condition or susceptibilities of the innocent spouse, the intention of the offending spouse and that spouse's knowledge of the actual or probable effect of the offending conduct on the other's health. *Cooper v. Cooper*³⁴⁴. Mere mental cruelty without causing bodily injury will not be sufficient, though mental cruelty affecting bodily health will be sufficient *Duerakabai v. Narsar Mathur*³⁴⁵.

Cruelty by deception.—Where a man who had married twice before with the marriages dissolved represented to the petitioner that he was a bachelor and induced her to marry and subsequently was misconducting himself and all this information came to the petitioner on inquiry with a shock which undermined her health, it was held that the husband's conduct amounted to cruelty justifying relief to the wife on that ground: *Carpenter v. Carpenter*³⁴⁶.

Incapacity to work or provide money for home, when cruelty.—While refusal of husband to give money to wife and asking her to get food for credit thereby leaving her to face the demand from creditors may not amount to cruelty³⁴⁷ where the husband refused to help

(341) (1955) 2 All E.R. 305.

(342) (1955) 2 All E.R. 311.

(343) (1958) 1 W.L.R. 693

(344) (1954) 2 All E.R. 450.

(345) 1953 Mad. 792.

(346) (1955) 2 All E.R. 449.

(347) *Eastland v. Eastland*, (1954) 3 All E.R. 966.

the wife or to earn money, did no work, had debts and pressing creditors and left his wife to support the household whereby her health deteriorated, it would amount to persistent cruelty.³⁴⁸ If without just cause or excuse the husband or the wife persists in doing things which she or he would not tolerate and which no ordinary person will tolerate it will amount to cruelty. If for instance, the husband is lethargic, does no work, is parasitical, selfish or callous, provides no money for the household or refuses to undertake paid employment to meet household expenses he, on the ground of cruelty is like to meet the same fate as Golins did in England.³⁴⁹

Wife's cruelty: perspectives and illustrative cases.—In judging what is cruelty no distinction between the spouses is made and the standard of judging is not different. Some trends in judicial thinking, however, fall to be noticed. For one thing, a wife's violence may not ordinarily produce as serious an impact on the body and mind of the husband as the husband's violence towards his wife. Secondly in judging the wife's cruelty the Court should consider not only whether violence on her part was likely to endanger the safety of the husband but whether it was not likely to imperil her own safety by provoking retaliatory action by the husband.³⁵⁰ The need to have regard to the mind of the petitioner requires the Court to consider also the greater proneness of a woman to psychological injury.³⁵¹ All circumstances which constitute, the occasion or setting for the conduct complained of have relevance but no assumption can be made that the respondent (wife) is the oppressed and the petitioner (husband) is the oppressor. The evidence in any case ought to bear a secular examination.³⁵² In the *Dastane case*³⁵³ the wife took delight in causing misery to her husband and willingly suffered the calculated insults hurled at him and his parents by her relatives. In her outbursts of temper she accused falsely "the pleader's sanad of that old hag of your father was forfeited." She cried out "I want to see the ruination of the whole Dastane family", "burn the book written by your father and apply the ashes to your forehead"; "you are a monster in a human body", "I will make you lose your job and publish it in the Poona newspapers". These coupled with acts like the tearing of the mangala sutra, locking out the husband when he was due to return from his office, rubbing chillie powder on the tongue of an infant child-beating a child mercilessly while in high fever, and switching on the light at night and sitting by the bedside of the husband merely to nag him were held to clearly amount to cruelty which tended to destroy the legitimate ends and objects of matrimony. The acts were of so grave an order as to imperil the husband's sense of personal safety, mental happiness, job satisfaction and reputation. Where a wife was given to abusing her husband in public catching hold of his collar, make him cook for her and when he served threw the plate on his head on the ground that it was not properly prepared and insisted on his asking for forgiveness, threatening to burn herself and give a false complaint so as to get her husband into trouble, catching hold of his neck when he was starting to the office with his colleague and preventing him from taking the instruments used for his work, stating before others that her husband may be killed in an accident so that she may get his insurance and provident fund amounts, it was held that these acts would make it impossible for the husband to live with his wife.³⁵⁴ Acts of the wife like

(348) *Gollins v. Gollins*, (1964) A.C. 644 (1963) 2 All E.R. 666.

(349) *Per* L. S. Mehta, J., in A.I.R. 1975 S.C. (Journal) p. 102.

(350) *See* *Forth v. Forth*, 46 L.J. P. & M. 192; *Pickard v. Pickard*, 33 L. J. P. & M. 122.

(351) *Kusum Lata v. Kamla Prasad*, 1965 All 280.

(352) *Dr. A. G. Dastane v. Mrs. S. Dastane*, 1975 S.C. 1534, 1536.

(353) *Ibid.*

(354) *Sreyendhar v. Vasantha Bai*, 1970 Mys. 232.

neglect of domestic duties making the husband on occasions to leave without food for the office, breaking her bangles, striking her head against the wall, throwing away articles, attempting to set fire to her clothes, using insulting language to her mother-in-law, failing to attend on her on her last illness, constant nagging of her husband, persistent insults to him etc. would amount to cruelty as would cause apprehension of harm or injury to him.³⁵⁵ Where a wife was suffering from epilepsy of a not incurable type, though it may cause mental pain to the husband, it cannot be said to cause reasonable apprehension in the mind of the husband that it would be harmful or injurious for him to live with her. It does not constitute cruelty as would afford ground for matrimonial relief.³⁵⁶ Where a newly wedded wife was accused of unchastity by her husband and he drove her out of his house and on being sent again to his house by her parents, she attempted to commit suicide and in her written statement alleged that her husband administered poison, the wife's allegation in the circumstances did not constitute an act of cruelty and cannot serve as a ground for dissolution of the marriage.³⁵⁷

Burden and standard of proof in cruelty cases—The burden lies on the petitioner to establish his or her case for, ordinarily the burden lies on the party which affirms a fact, not on the party which denies it. The petitioner must therefore prove that the respondent has treated the former with cruelty.³⁵⁸ Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. It is wrong to import such consideration into trials of a purely civil nature. The section does not require the petitioner to establish the charge of cruelty beyond reasonable doubt. The Court goes by the preponderance of probabilities.³⁵⁹

Condonation of cruelty—Condonation signifies for givenness of the matrimonial offence and the restoration of the offending spouse to the same position as he or she occupied before the commission of the offence. To constitute condonation there must be two things: forgiveness and restoration.³⁶⁰ Even if condonation is not pleaded as a defence by the respondent, the Court is under an obligation which has to be discharged even in undefended cases to find out whether the respondent's cruelty has been condoned by the petitioner, inasmuch as relief can be granted only if the Court is satisfied but "not otherwise," that the petitioner has not in any manner condoned the cruelty.³⁶¹ Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof of condonation by the other.³⁶² Intercourse is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and received back into the former position.³⁶³ Subsequent conduct of the respondent, however, may be such as to revive the original cause of action.³⁶⁴

(355) *Manjulabai v. Ramchandra*, 1975 M.P.L.J. 682.

(356) *Raghunath v. Vijaya*, 1 L.R. (1972) Bom. 511; 73 Bom. L.R. 840; 1970 Bom. 132.

(357) *Guruchandrasekh Reddy v. Sarda Swarn Singh*, 1978 All. L.J. 284; 1978 All. 255.

(358) *Dr. N.G. Dasgupta v. Mrs. S. Dasgupta*, 1975 S.C. 1534.

(359) *Ibid.*

(360) *Ibid.* [cf., *Champa Gouri v. Jyotandas Amichand*, (1971) 1 A.P.L.J. 230.

(361) *Ibid.*

(362) *Ibid.*

(363) *Ibid.*

(364) *Ibid.*

5. **Desertion.**—(1) Meaning and ingredients: Desertion for a continuous period of not less than two years immediately preceding the presentation of the petition is a ground for divorce as well as judicial separation. The *Explanation* makes it clear that desertion means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent and against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage.³⁶⁵ In its essence, it signifies the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage.³⁶⁶ Desertion includes also the wilful neglect of one of the spouses by the other.³⁶⁷ For the offence of desertion, so far as the deserting spouse is concerned two essential conditions must exist: (1) the factum of separation, and (2) intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.³⁶⁸ Desertion is a withdrawal not from a place but from a state of things.³⁶⁹ There can be desertion without previous cohabitation and there can be desertion without the marriage having been consummated.³⁷⁰ Desertion is a matter of inference to be drawn from the facts and circumstances of each case.³⁷¹

Desertion as a ground of judicial separation or divorce differs from the other statutory grounds for such relief like adultery and cruelty in that the act gives rise to the cause of action as inchoate till the suit is instituted.³⁷²

Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion.³⁷³ If a spouse leaves the other in a state of temporary passion, for instance in anger or in disgust it will not amount to desertion.³⁷⁴ Where the husband himself took his wife to her mother's home for confinement it

(365) *Chakradhar Mohanty v. Kumudini Devi*, 1971 (1) G.W.R. 737

(366) *Lachman v. Meena*, 1964 S.C. 40; See further *Lakh Kaur v. Narain Singh*, 1978 P. & H. 317; *Kripal Singh v. Harbans Kaur*, 1967 Delh. 19; *Rajni Kumari v. Narendra Singh*, 1970 All. 102; *Mallappa v. Neelamma*, 1970 Mys. 59; *Chakradhar Mohanty v. Kumudini Devi*, supra.

(367) *Mangalabai v. Deoras*, 1962 M.P. 193

(368) *Bipin Chander v. Prabhawati*, 1957 S.C. 176; *Rajni Kumari v. Narendra Singh*, 1974 S.C. 459; see also *Chakradhar Mohanty v. Kumudini Devi*, supra; *Jasbir Kaur v. Rajni Singh*, 1975 Punj. L.R. 129; *Chitty Venkanna v. Mahalakshmi*, (1976) 2 An. W.R. 45; (1976) 1 A.P.L.J. 207; *Parihar v. Parihar*, 1978 Raj. 140. See further *Lachman v. Meena*, supra; *Tirupathi Rao v. Krishnamma*, (1970) 1 An. W.R. 13; *Satish Kumar v. Satran*, 1961 Cal. 573 and *Williams v. Williams*, (1959) 3 All. E.R. 825; *Pratt v. Pratt*, L.R. (1959) A.C. 417; *Cohen v. Cohen* L.R. (1940) A.C. 631.

(369) *Kharajod v. Manoharan*, (1917) 39 Bom. L.R. 1141, 1142; *Guba v. Guba*, 1970 Cal. 286.

(370) *Chitty Venkanna v. Mahalakshmi*, supra.

(371) *Lachman v. Meena*, supra; *Bipin Chander v. Prabhawati*, supra; *Chakradhar Mohanty v. Kumudini Devi*, supra.

(372) *Sitabai v. Ramchandra*, 1958 Bom. 116.

(373) *Rajni Kumari v. Narendra Singh*, 1972 S.C. 459; (1972) 1 S.C.J. 467; *Leela Devi Shivrajgare v. Mahabharati Shivrajgare*, 1959 M.P. 348; *Rangabandini v. Mahabharatani*, 1967 Mad. 248.

(374) *Chakradhar Mohanty v. Kumudini Devi*, supra; *Lakh Kaur v. Narain Singh*, supra.

is not a case of leaving the matrimonial home in order to deserting the husband.³⁷⁵ Where due to circumstances like business or professional duties or mutual convenience the spouses were temporarily separated, there would be no question of desertion.³⁷⁶ Mere refusal of matrimonial bed by wife is no desertion; nor is it desertion to neglect opportunity for cohabiting with the husband.³⁷⁷ To constitute desertion it must be established: (a) the spouses must have parted or terminated all joint living, (b) the deserting spouse must have an intention to desert the other spouse, (c) the deserted spouse must not have agreed to the separation, (d) the desertion must have been without cause, and (e) this state of affairs must have continued, for the requisite period.³⁷⁸

The quality of permanence is one of the essential elements differentiating desertion from voluntary separation.

(ii) Intention to desert or abandon. In the American Jurisprudence it is stated. "In the determination of what constitutes desertion, one of the first matters for consideration is the intent of the offending party; there must be in addition to separation or withdrawal from cohabitation, an intent on the part of the withdrawing party not to return or resume cohabitation. The wrongful intent to desert is indispensable. A mere severance of the relation is not sufficient since there may be a separation without desertion and desertion without separation. Continued separation of husband and wife which may be consistent with no intention to wilfully and obstinately desert is not a desertion."³⁷⁹ Desertion does not imply only a separate residence and separate living. It is also necessary that there must be a determination to put an end to marital relation and cohabitation. Without *animus deserendi* there can be no desertion.³⁸⁰ When the factum and intention to desert have been established, such intention is presumed to continue unless the offending spouse proves genuine repentance and a reasonable attempt to go back to the deserted spouse.³⁸¹

(iii) Commencement of desertion.—Since in addition to separation there must be the animus or intention never to return to conjugal society, the intention may supervene separation which might have started quite innocently. A *de facto* separation may take place without the animus as in separation by mutual consent or by compulsory separation. On the other hand there may be *animus deserendi* without separation as where the parties live as two households under the same roof.³⁸² The offence of desertion commences when the factum of separation and the *animus deserendi* co-exist.³⁸³ It is not however necessary that they

(375) *Baye v. Aloka*, 1969 Cal. 471.

(376) *Thomas v. Thomas*, 1924 P. 194; *Chadley v. Chadley*, 69 L.T. 617.

(377) *Biagum v. Sathya Ram*, L.L.R. (1960) 1 Punj. 579; 1961 Punj. 181.

(378) *Rangaswami v. Arundhaniam*, 1957 Mad. 243.

(379) Vol. 17, p. 194.

(380) *Rohini Kumari v. Narendra Singh*, (1972) 1 S.C.J. 487; 1972 S.C. 459; *Loh Kew v. Narain Singh*, 1978 P. & H. 317; *Sunderbhan Singh v. Kuldeep Kaur*, (1976) 78 Punj. L.R. 129; *Jasbir Kaur v. Ranjit Singh*, 1978 Punj. L.R. 129.

(381) *Lachman v. Memo*, 1964 S.C. 40; See also *Kirpal Singh v. Harbans Kaur*, 1967 Delhi 19, *Mallappa v. Neelamma*, 1970 Mys. 39.

(382) *Guba v. Guba*, 1970 Cal. 266.

(383) *Chandrabati Mahapaty v. Kamalini Devi*, 1971 (1) O.W.R. 737; *Sigam Singh Gattawa v. Binola Kinnari Gattawa*, (1978) 80 Punj. L.R. 23 (Delhi).

should commence at the same time.³⁸⁴ Where the intention to abandon is formed subsequent to the separation, that intention will not relate back to the date of the prior separation for the purpose of desertion and the period of two years must be calculated only from the time the intention is manifested or proved to have formed. The onus of proof in this regard must be on the deserting spouse to show when exactly the intent was entertained since that is a matter which is specially within the knowledge of the deserting spouse. The initial presumption in the absence of circumstances to the contrary is that the intention to abandon and the factum of separation are simultaneous for the purpose of calculating the period of desertion.

(iv) **Cause for desertion**—Causes leading to desertion may be many and varied. Ill-treatment by the husband or his misconduct making the wife miserable in the husband's home may in conceivable cases be a ground for holding that the wife is justified in deserting her husband. Mere frailty and violence of temper, however uncontrolled and persistent, and gross and habitual intemperance and habits quite distasteful to the husband do not constitute reasonable cause for depriving the wife of the protection and comfort of the husband's home and society.³⁸⁵ The consideration that in case the husband remarries the wife is entitled to separate residence and maintenance under statutory provision could not be utilised as a reason for concluding that the husband's remarriage must necessarily afford a reasonable cause for desertion.³⁸⁶ Nor is the circumstance that the wife has run the husband into debts a ground for the husband abandoning the wife.³⁸⁷ Serious allegations of unchastity made by the husband against his wife affords grave and weighty reason for the wife to live apart.³⁸⁸ The following have been held to constitute sufficient grounds for desertion: confession of adultery by the wife,³⁸⁹ wife permitting indecent liberties being taken by others with her,³⁹⁰ unreasonable and persistent refusal by the wife to consummate the marriage³⁹¹ persistence in the false charge of unnatural offence having been committed by the husband etc.

(v) **Desertion must be without consent or against the wish of the petitioner.**—To constitute desertion by a spouse his or her absence and the cessation of cohabitation by him or her must be without the other's consent and without reasonable cause.³⁹² A separation however long, with the consent or acquiescence of the petitioner, cannot constitute desertion for the purpose of a decree for judicial separation. Thus if a spouse, not entirely blameless for the other going away and living separately, makes no effort whatsoever to induce the other to return for joint living and acquiesces in and is content with the continuance of the separate living, he or she cannot be heard to complain and ask for judicial separation on the ground of

(384) *Chakrabarty Mohanty's case*, 1971(1) C.W.R. 787; *Dasi Singh v. Sujila Dey*, 1972 Raj. 3; *Parasham v. Dookh*, 1973 Raj. 3.

(385) *X v. X*, I.L.R. 22 Mad. 328.

(386) *Rohini Kumari v. Narendra Singh*, (1972) 1 S.C.J. 467 1972 S.C. 438.

(387) *Holloway v. Holloway & Campbell*, I.L.R. 5 All. 71; *Starbuck v. Starbuck*, 59 L.J. P. & M. 20.

(388) *Lachman v. Meena*, 1964 S.C. 40.

(389) *Faulder v. Faulder*, 64 L.T. 334.

(390) *Hansell v. Hansell*, 29 L.J. P. & M. 21.

(391) *Singh v. Singh* (1900) P. 188, on appeal (1901) P. 317.

(392) *Bai Appalai v. Kishaji*, 38 Bom. L.R. 77.

desertion. A consent given by the petitioner for the separate living of the respondent either at the time of the departure of the respondent for such separate living or during the continuance of such separate living, will take away an essential ingredient of desertion. Besides, where the parties to a marriage, after having lived together for some time after the marriage enters into an agreement for separate living it cannot be postulated that the separation constitutes desertion because, the essential element to constitute desertion, namely, separation against the wish or without the consent of the other spouse cannot be posited.³⁹³

The consent which will take away the necessary element may be expressed by a formal deed or by an agreement or it may be tacit or inferred from conduct. It is possible that a separation which began by consent may become desertion if the consent ceases on both sides and the *animus deserendi* supervenes on the part of the respondent, *Parry v Parry*.³⁹⁴ Where the separation is in pursuance of an agreement in writing, but the agreement has not been acted upon and the parties thereto continued to cohabit even thereafter, a subsequent separation without the consent and for no justification, will amount to desertion, and the agreement in writing cannot avail to support the plea of consent for separation. So also, if the agreement has been obtained by fraud or force or has been put an end to by both the parties, that agreement will not be an answer to the charge of desertion. It must be remembered that in respect of an agreement for separate living between the parties, there is a distinction between an agreement for separate living entered into before the marriage, and one entered into after the marriage and during the continuance of cohabitation. The former agreement, namely, an agreement entered into before the marriage to the effect that the parties shall not live together cannot be banked upon as an answer to the charge of desertion because such an agreement is void as opposed to public policy, but the latter agreement can be founded upon as valid defence to an allegation of desertion: *Vadnam Tirupathi Rao v Krishnamma*.³⁹⁵

It is for the party seeking to establish desertion to give evidence of conduct on his or her part showing that the separation was without the consent of the party alleging desertion and against such party's wishes.³⁹⁶

Constructive desertion—If one spouse by words and conduct compels the other to quit the matrimonial home the former will be guilty of desertion though it is the latter who has physically separated from the other and left the matrimonial home.³⁹⁷ The spouse responsible for creating the situation in which the other spouse is forced to stay away is guilty of constructive desertion.³⁹⁸ Constructive desertion is the expression used to show that the spouse who forces the other to leave him or her is guilty of desertion even though the party going away from the matrimonial home is the other party. In deciding the question of desertion, the Court has to look at the conduct of both the spouses and it must be remembered that there is no substantial difference between a husband leaving his wife *animus deserendi*, and a husband

(393) *Mary D' Rozario v. Ernest D' Rozario*, 1941 Bom. 372.

(394) 1939 P. 288; 1939 (3) A.E.R. 779

(395) (1970) 1 A.W.R. 13.

(396) *Foule v. Foule*, 4 Cal. 260; *Ward v. Ward*, 27 L.J.P. & M. 63. See also *Slyam Sunder Goutam v. Bimla Kumari Goutam*, (1978) 80 Punj. L.R. 23 (Delhi); *Sudarshan Singh v. Kuldip Kaur*, (1976) 78 Punj. L.R. 371.

(397) *Dipinchandra v. Prabhakari*, 1957 S.C. 176, 187-188; *Balraj Kumari v. Narendra Singh*, (1972) 1 S.C.J. 487 1972 S.C. 459; *Lang v. Lang*, (1954) 3 All E.R. 571.

(398) *Tara Chand v. Narain Dutt*, 1976 P. & H. 390.

who by his conduct with like intention brings cohabitation to an end by compelling his wife to depart from the matrimonial home: *Mangala Bai v. Deorao Gulabrao*.³⁹⁹

It would be constructive desertion where the wife made her husband believe that she had committed adultery and thereupon he left the matrimonial home.⁴⁰⁰ A mere wish that the other spouse should leave is insufficient by itself to constitute constructive desertion.⁴⁰¹

The question of desertion cannot be decided by merely enquiring which party left the matrimonial home. The husband may well live in the place but make it absolutely impossible for the wife to live there, and if in that state of things the wife leaves the matrimonial home it can legitimately be held that it is the husband that has deserted the wife, and not the wife that has deserted the husband: *Shrivastava v. Mannokarlal*.⁴⁰² The position has been succinctly stated in the American Jurisprudence, Volume 17 at page 201 as follows:

"Usually the spouse who withdraws from cohabitation or absents himself from the other spouse is the one chargeable with desertion. However, this is not necessarily true. Either spouse may by reason of misconduct or cruelty drive the other away, in which case the former, and not the latter is the deserter or is guilty of desertion. In other words, the conduct of one of the parties, may justify separation from him or by the other and confer the right upon the latter to obtain a divorce upon the ground of wilful desertion. Thus if a husband by his extreme cruelty to his wife compels her, for her own safety and protection, to seek a home elsewhere than under his roof, she does not thereby desert him, within the meaning of the statute, on the other hand, under such circumstances, he is chargeable with the offence of deserting his wife, and she may obtain a divorce on that ground. The same principle applies where the husband is forced to leave his wife on account of her cruelty. The rule that cruelty on the part of the husband which justifies the wife in separating from him may constitute desertion on his part and entitle the wife to a divorce on the ground of desertion is not open to the objection that it gives the wife a remedy greater than the statute provides, namely, an absolute divorce instead of a limited divorce.

To constitute constructive desertion, it is not necessary to show that the defending spouse misconducted himself or herself with the intent of forcing the other to leave the home; nor is it necessary that there should have existed in connection with the acts of cruelty any settled purpose to drive away the other. It is enough if such is the natural consequence of the acts. The complaining spouse must, of course, be justified in leaving the defending spouse in order to constitute such desertion by the latter. It has been held that to justify the separation and to entitle the complaining spouse to a divorce on the ground of desertion, the conduct of the guilty party must have been such as to afford ground for a limited divorce. Some Courts have gone to the extent of holding that in order to constitute constructive desertion, it must have been such as would, in itself, have been a ground for an absolute divorce. In many jurisdictions, however, the rule adopted does not require the misconduct to be such as in itself would have been a ground for divorce."

(399) 1962 M.P. 1968.

(400) *Baker v. Baker*, 1954 P. 35, 35.

(401) *Chatter v. Chatter*, (1901) 84 L.T. 272; *Bushie v. Bushie*, (1947) 1 All E.R. 326.

(402) 1959 M.P. 349; see also *Dinu v. Dinshaw*, I.L.R. (1969) Bom. 1049. 72 Bom.L.R. 41; 1970 Bom.

(vi) **Wilful neglect and desertion.**—The *Explanatory* to section 10 says that desertion includes the wilful neglect of the petitioner by the other party to the marriage: "Wilful" means "on purpose", "intentional" and "neglect" means neglect in the discharge of marital obligations of consortium and cohabitation. *Mangela Bai v. Deorao Gulabrao*⁴⁰³. It is possible to have wilful neglect inferred even when the parties are living under the same roof where the deserting spouse does not discharge the duties of the husband or wife to the other spouse. *Smith v. Smith*,⁴⁰⁴ *Pooval v. Pooval*⁴⁰⁵. The mere fact that a husband has made suitable allowance for the wife is no answer to a charge of desertion against him because a wife is entitled not only to maintenance by receiving food, shelter and raiment at his hand, but she is also entitled to the protection and society of her husband. Thus where a husband has separated from his wife without her consent but has been paying intermittent visits to her without resuming marital intercourse it may come under wilful neglect: *Thurston v. Thurston*,⁴⁰⁶ *Macdonald v. Macdonald*⁴⁰⁷. The wilful neglect of the husband regarding his wife will include also the failure of the husband to provide the wife, though living with him, the funds for subsistence consistent with his means and income. But the failure on his part to provide the necessary funds for running the home due to his inability and indigence and not because he intends or desires to see her starve will not amount to wilful neglect constituting desertion under this section.⁴⁰⁸

vii **Desertion must be for a continuous period of not less than 2 years**—For succeeding in a petition for judicial separation or divorce on the ground of desertion by the respondent, it is necessary for the petitioner to prove that the desertion has lasted for a continuous period of two years or more immediately preceding the presentation of the petition. Two things are essential, namely, that the period of not less than two years should be shown as the period during which the desertion has continued and that the said period is one without any break. If the petition is filed within this period, then it has to be dismissed as premature even though at the time of hearing two years had elapsed. Thus in a case where before the expiry of the period of two years the husband who had deserted his wife and was living away from her, *bona fide* offers to return to her and resume cohabitation, his absence is deprived of the character of desertion and the onus of showing that the offer is not *bona fide* is on the petitioner: *Martin v. Martin*.⁴⁰⁹ Once the desertion for a period of not less than two years is completed the deserted party acquires a complete right to relief and a *bona fide* offer made thereafter by the forsaking party to resume cohabitation will not deprive the separation of its character of desertion.⁴¹⁰ Desertion not being a specific act but a continuing course of conduct, it must be shown to have continued for the statutory period without any interruption therein, and two periods of desertion interrupted by a reconciliation cannot be added together for the purpose of making up the period required by the section.⁴¹¹ If the deserting spouse

(403) 1962 M.P. 1963

(404) (1940) P. 49

(405) (1922) P. 278.

(406) 26 T.L.R. 388

(407) 4 S. & T. 242.

(408) *Georgina v. Edward Nathaniel*, 1955 All. 8

(409) 78 L.T. 568.

(410) *Cargill v. Cargill*, 27 L.J. P. & H. 61; *Purnima Nandya v. Sitababhai Ammal*, 1936 Hind. 415.

(411) *Ch. Sitabai v. Ramabai*, 39 Bom. L.R. 885.

becomes insane before the termination of the requisite period, desertion cannot be said to have continued for the requisite period, since the time during which the insanity continued cannot be considered and included in computing the period of desertion. So also if before the expiry of the period of desertion, the spouses enter into an agreement for separate living, the separation ceases to be desertion as from the date of the agreement. Besides any supervening conduct on the part of the deserted spouse which is an effective and reasonable cause in preventing the deserting spouse from returning to cohabitation is an answer to the petition as for instance if the wife has been deserted by the husband and the wife during the period of desertion commences to live in adultery or is guilty of other acts which will be reasonable grounds for the husband not returning to cohabitation with the wife, the husband cannot be held to be guilty of desertion from the date of his knowledge of the wife's misconduct. Therefore, the following should be established for the maintainability of the petition regarding the requisite period of two years under the section.

- (a) the period of two years of desertion must be immediately preceding the petition for judicial separation or divorce;
- (b) that period must be continuous and unbroken by reconciliation and resumption of cohabitation;
- (c) there should be no agreement to live separately during the said period;
- (d) the deserted spouse should not be guilty of any act or misconduct giving cause for the deserting spouse not to resume cohabitation;
- (e) the deserting spouse must be of sane mind during the entire period of not less than two years of separate living.

(viii) **Termination of desertion**—It is necessary that during the entire period of desertion the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable.⁴¹² And it is open to the deserting spouse at any time before the other spouse petitions for judicial separation or divorce to terminate the desertion by resumption of cohabitation or genuine offer of reconciliation.⁴¹³ Reinstatement cannot be refused in such a case.⁴¹⁴ Casual acts of sexual intercourse during the period will not be proof of resumption of marital relationship where the deserting spouse, though party to such acts, has in all other respects repudiated the relationship.⁴¹⁵

(ix) **Defence to action on ground of desertion**.—Matrimonial offence by one spouse would justify desertion by the other.⁴¹⁶ Even conduct falling short of matrimonial offence may, in some cases be a good defence.⁴¹⁷ Thus conduct falling short of legal cruelty may yet be such as to justify the other spouse in going away from the matrimonial home.⁴¹⁸

(412) *Lachman v. Meena*, 1964 S.C. 40. Cf., however *Kake v. Aji Singh*, 1960 Punj. 328.

(413) *Bijay Chandra v. Prabhawati*, 1957 S.C. 176.

(414) *Perry v. Perry*, (1952) 1 All E.R. 1076.

(415) *Sambir Kumar Banerjee v. Syata Banerjee*, (1966) 70 Cal. W.N. 633.

(416) *Mate v. Sathi*, 1961 Punj. 132; *Ginsister v. Ginsister*, (1945) 1 All E.R. 413, 520.

(417) *Meena v. Lachman*, 61 Bom. L.R. 1549.

(418) *Edwards v. Edwards*, (1949) 2 All E.R. 145.

(a) **Effect of condonation of desertion.**—Under section 23 (1) (b) condonation may be fatal to prayer for relief. Desertion for a period of not less than two years before the presentation of the petition, if condoned, cannot be revived.⁴¹⁸ Whether cohabitation while proceedings are pending amounts to condonation or is but an attempt at reconciliation would depend on the facts of the case.⁴¹⁹

(ii) **Burden and standard of proof.**—The petitioner must show that the desertion was without reasonable cause.⁴²¹ He must also show that it persisted throughout the entire prescribed period.⁴²² The burden lies on the petitioner to establish the factum of separation as well as the intention (*animus deserendi*) throughout such period.⁴²³ Desertion like other facts must be proved on the preponderance of probabilities.⁴²⁴ The facts have to be viewed as to the purpose which is revealed by those acts or by conduct and the expression of intention both anterior and subsequent to the actual acts of separation. If in fact there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*.⁴²⁵ So long as there was some evidence on the strength of which the Court could be satisfied about desertion the grant of relief will not be disturbed.⁴²⁶ Once it is found that one of the spouses has been in desertion, the presumption is that the desertion has continued.⁴²⁷ Before granting a decree as prayed for the Court should be satisfied that the requirements of section 23 are met.⁴²⁸

6. **Conversion.**—This is designed to enable a person to file a petition for a decree of divorce on the ground that the respondent has ceased to be a Hindu by conversion to another religion. Conversion to another religion does not mean a conversion from Hinduism to Buddhism or *vice versa* or from Hinduism to Jainism or *vice versa*, but means a conversion to one of the major religions whose adherents cannot be brought within the definition of a Hindu given in section 2 of this Act. It must be distinctly understood that conversion to an alien faith does not *ipso facto* result in divorce of the converted spouse from the other spouse. A petition is necessary for the purpose. The reason is simple. In these days of cosmopolitan mixtures and alliances, a matrimonial alliance between persons belonging to different religions does not attract that opprobrium as it once did, and it is now not unusual to find spouses belonging to different religions living in harmony and affection though pursuing their own religious practices separately. So it is open to two persons who have been married under this Act to live together in spite of the fact that one of them has subsequently become a

(419) *Perry v. Perry*, (1952) 1 All E.R. 1076.

(420) *Samar Kumar Banerjee v. Sujata Banerjee*, (1966) 70 Cal WN 633.

(421) *Lachman v. Meena*, 1961 S.C. 46; *Rohini Kumari v. Narendra Singh*, 1972 S.C. 459; *Labb Kuar v. Narain Singh*, 1978 P & H 317.

(422) *Bipin Chandra v. Prabacati*, 1957 S.C. 176.

(423) *Parhar v. Parhar*, 1978 Raj 140; *Jasbir Kaur v. Ranjit Singh* 1975 Punj. L.R. 129.

(424) *Shyam Sunder Gaudan v. Binla Kumari Gaudan*, (1978) 80 Punj. L.R. 23 (Delhi); *Sudharsan Singh v. Kuldeep Kaur*, (1976) 78 Punj. L.R. 391; *Shyam Narain v. Sahib*, (1978) 4 A.L.R. 882.

(425) *Chakrabarty Mahanty v. Kamadhar Dey*, 1971 (1) C.W.R. 787.

(426) *Rambhaur v. Madanlal*, (1977) 79 Bom. L.R. 145.

(427) *Dona v. Dinshaw*, I.L.R. (1969) Bom. 1043; 1970 Bom. 341.

(428) *Chaman Lal v. Mohender Dahi*, 73 Punj. L.R. 104; *Vasuraghatam v. Parvathy*, 1973 Ker. L.J. 762 1974 Ker. 43.

convert to Mohamedanism or Christianity without getting the marriage dissolved by a decree of divorce. This is only an enabling provision permitting either spouse to get the marriage bond sundered, and it is not a compulsory one leaving no option to either spouse but to become divorced from the other.

7. **Incurable unsoundness of mind etc.**—While Section 5 (ii) postulates as one of the conditions of a Hindu marriage that at the time of the marriage neither party must be incapable of giving a valid consent to it in consequence of unsoundness of mind and Section 12 (1) (b) renders at the instance of the other spouse a marriage in contravention of the condition voidable, Section 13 (1) (e) deals with incurable unsoundness of mind which may occur even subsequent to the marriage. The expression "incurably of unsound mind" has been held not to cover the case of feeble-minded persons or persons of dull intellect who can understand the nature and consequences of their acts and control them and their reactions in the normal way⁴²⁹. In deciding whether a person is "incurably of unsound mind," the test applied is "whether by reason of his mental condition he is capable of managing himself and his affairs and if not, whether he can hope to be restored to a state in which he will be able to do so. I would add to the above test the rider that the capacity to be required is that of a reasonable man."⁴³⁰ Applying this test in *Gnanambal v. Selvaraj*,⁴³¹ where the wife was suffering from schizophrenia [not incurable disease by itself see *Dastane v. Dastane*⁴³²] which in spite of treatment over a long period had left her memory without reasonable prospect of restoration to its normal condition and would enable her to live only a half life, the Court held that she was incurably of unsound mind.

It is for the petitioner to establish that the other spouse was of incurably of unsound mind or suffering from mental disorder⁴³³. If there was a finding by the Court in an Inquisition under the Lunacy Act of such spouse being a lunatic it will be *prima facie* evidence shifting the burden of proof to the persons averting the contrary⁴³⁴. As is sometimes observed, an action for divorce is a kind of a triangular proceeding to which the husband and wife and the State are parties, and the State, therefore, represented by its judicial limb, namely the Court is concerned to see that its arm is long enough and strong enough to meet and smite injustice wherever it lies. Injustices in matrimonial matters are easily perpetrated by the parties and it is all the more necessary for the Courts to be vigilant and see that the sanctity of marital life is not unnecessarily and unduly profaned and polluted by indiscriminate and hasty proceedings in Courts. In a petition for dissolution of marriage on the ground that the respondent is incurably of unsound mind, such unsoundness of mind should be clearly established by the petitioner and there is no right in the petitioner to compel the respondent to undergo medical examination, though it is open to the Court to draw adverse inference when the respondent refuses to submit to medical examination: *Vijin Chandran v. Madhuriben*.⁴³⁵

(429) *Ajit Rai Moha v. Bas Varmati*, 1969 Guj. 48.

(430) *Wheeler v. Wheeler*, (1959) 3 All E.R. 369.

(431) (1970) 2 M.L.J. 429; 83 L.W. 494; See also *Bani Devi v. A.R. Banerjee*, 1972 Delhi 50.

(432) 1970 Bom. 312.

(433) *Ajit Rai Moha v. Bas Varmati*, *supra*.

(434) *Seshamma v. Padmanabha*, I.L.R. 40 Mad. 868.

(435) 1963 Guj. 250. See also *Shanti Devi v. Ram Neph*, 1972 P & H. 270; 1972 Car. L.J. 313.

8 Leprosy.—Section 13 (1) (iv) deals with virulent and incurable form of leprosy as a ground for divorce at the instance of the spouse other than the one afflicted with the disease. Two conditions are posted—(1) that the leprosy must be virulent, and (2) that it is incurable—*Annapoornamma v. Apparao*⁴³⁶. The term 'virulent' in connection with leprosy under section 13 (1) (iv) is not a medical term and cannot be interpreted by referring to the meaning given to it under the Hindu law for excluding a person from inheritance.⁴³⁷ The term has been interpreted as signifying malignant or infectious.⁴³⁸ 'Virulence' as a ground of exclusion from inheritance was treated in the Hindu religious and legal texts from the angle of a person's competence to perform his social and religious obligations and the decisions⁴³⁹ accordingly used it to describe the leprosy of the most serious and aggravated type. This does not give any sure and reliable guide in interpreting the term 'virulent'.⁴⁴⁰ Leprosy on account of modern researches and advance in medical science is curable at the initial stage and may become incurable if allowed to develop unchecked by proper treatment. Again what is regarded as curable at one time may be regarded as incurable at another time.⁴⁴¹

9 Venereal disease.—Venereal disease in a communicable form has been made a ground for divorce under Section 13 (1) (v). As to when the disease is 'communicable' is not an easy one to decide even with the help of medical evidence, but there it is and the condition must be fulfilled before a decree for divorce can be passed.

It is no answer to the petition to say that the petitioner has not been communicated with the disease. Nor is it a valid defence to take that in fact the petitioner had already contracted the disease and it had passed the stage of communicability and therefore the petition does not lie.

10. Renunciation of the world by entering a religious order.—A person can work his or her own civil death by becoming an ascetic, by renouncing the world and becoming a sanyasi. What exactly the expression "renouncing the world by entering any religious order" means can be gathered only by the previous decisions in Hindu Law on the question. There are two qualifications in this clause: (1) the renunciation of the world and (2) entering a religious order. The mere fact that a person says that he has renounced the world is not sufficient.⁴⁴² He must have, besides, entered the order of sanyashood by showing a positive act or ceremony. There must be initiation by a guru into the order of sanyasis by the appropriate mantra.⁴⁴³ Without the performance of the necessary ceremonies, the renunciation will not be complete.⁴⁴⁴ In the religious law of the people, one who has become a sanyasi in

(436) (1962) 2 Andh. W.R. 494 1963 A.P. 312

(437) *Swarajya Lakshmi v. Padma Rao*, (1974) 1 S.C.J. 623 1974 S.C. 165

(438) *Ibid* (Lepomatous leprosy is virulent and incurable); *Annapoornamma v. Apparao*, supra

(439) *Romabai v. Harmanji*, 1 L.R. 43 Bom. 363 1924 P.C. 125; *Kapurthala Pathan v. Subbaraya Thevar*, 1 L.R. 38 Mad. 250

(440) *Swarajya Lakshmi's case*, supra.

(441) *Kapurthala Pathan's case*, supra

(442) *Kandol Rao v. Iswara Sampan*, 33 M.L.J. 63 at 65.

(443) *Sajjanarayana Anadham v. Religions Endowment Board*, 1957 A.P. 824 at 826.

(444) *Baldoo Prasad v. Arya Prati Nidhi Sabha*, 1930 All 643 at 644.

the proper sense of the term is considered as having given up all pleasures and properties whose sole duty is to pray to God and wait for the call for departure from this world. Such a person cannot be expected to fulfil the obligations of matrimony chief of which is marital cohabitation, a thing which is forbidden for one who has entered the Sanyasi order. This ascetic order is to be found almost in every religion, be it Mahamedanism, Christianity or Hinduism, but the religious order here spoken of is the religious order among the Hindus, *viz.*, a religious order amongst the Buddhists, the Jains or any other sect amongst the Hindus including the Hindus strictly so called. It has become of late a lucrative profession to don the yellow robe and parade as a Yogi or Yathi to attract public subscriptions, sympathy and veneration at the same time carrying on the duties of a householder. It is not to such persons that this clause is intended to apply. There is no renunciation of the world, but on the other hand a further attachment to the pleasures of life for which person in the yellow robe wants to amass wealth by masquerading in the guise of a Sanyasi. Nor is there any religious order to which he can be said to have been admitted by the performance of the usual ceremonies incidental to necessary for the change. There are many such impostors who are really much-married husbands who are drawn to the pleasures of sex-life in ever-increasing degree but who cannot get on in the world except by deceiving it, by covering up the fraud in the saffron robes.

11. Absence of the spouse for seven years and not being heard of.—Clause (iii) provides that when a spouse has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive the other spouse is entitled to file a petition for a decree of divorce on this ground. This is based on the principle of section 108 of the Evidence Act which raises the presumption of death in respect of a person who has not been heard of for not less than seven years by his relations or friends or others who would have heard of him if he were alive. The reason of this rule is obvious. Neither in Hindu Law nor in any other civilised jurisprudence is a spouse enjoined to wait eternally for the other spouse who has betaken himself or herself to an unknown destination and has not cared to communicate his whereabouts to the other spouse. The missing person may be alive, but the law presumes that he is dead because a person is not likely to be alive if no news has been obtained about him by those who would have naturally heard about him or his whereabouts either from him or from others. The pleading in a petition for divorce under section 13 (1) (iii) must contain the following particulars, namely, (a) the date when and the place where the spouses last cohabited, (b) the circumstances relating to cessation of cohabitation, (c) the date when and the place where the other spouse was last seen or heard of, and (d) the steps taken to trace that person. When a person has not been heard of for seven years, the presumption under section 108 of the Evidence Act is that he is not alive at the time the question is raised.⁴⁴⁵

12. Non-resumption of cohabitation after judicial separation or decree for restitution of conjugal rights.—Section 13 (1-A) was introduced into the parent Act by the Hindu Marriage (Amendment) Act (XLIV of 1964). Prior to this amendment under Section 13 (1) (iii) and (iv) of the parent Act a petition for divorce could be filed only by the spouse who had obtained a decree for judicial separation or restitution of conjugal rights

(445) *Narbi v. Lal Beha*, (1908) I.L.R. 37 Cal. 103.

The Marriage Laws (Amendment) Act (LXVIII of 1976) has reduced the period of two years to one year after such decree.

Thus under section 13 (1-A) as it now stands, either spouse may apply for divorce on the ground that there has been no resumption of cohabitation between them for a year or more after the passing of a decree for judicial separation or there has been no restitution of conjugal rights for a year or more after the passing of a decree for restitution. The sub-section refers to existing state of affairs and all that is required is that in fact there has been no resumption of cohabitation during the period⁴⁴⁶. The sub-section provides only a ground for applying for divorce. The existence of the circumstances entitling a spouse to relief does not automatically result in a dissolution of the marriage. The party must present a petition for the purpose and a decree on such petition is necessary⁴⁴⁷.

As stated above section 13 (1-A) entitles not merely an aggrieved party but also a defaulting party to obtain dissolution of the marriage. The question is no longer who obtained the decree for restitution of conjugal rights or for judicial separation, or, who was at fault previously or who is at fault now. The question is not one of apportioning blame. The question is have the parties been able to come together after the decree. If they have not been able to come together either party may seek divorce irrespective of whose fault it was that they did not come together. There is, however, the question as to the effect of section 23 on the provisions of section 13 (1-A). Judicial opinion is conflicting. One view is that section 13 (1-A) does not confer an absolute or unrestricted right on a party to obtain a decree of divorce, that it is open to a Court to see not only whether the provisions of section 23 (1) are satisfied but the Court is under an obligation to consider that aspect and that the Court must not grant relief to a party taking advantage of his own wrong.⁴⁴⁸ A slightly different view is that the Court has got to reconcile the provisions in section 13 (1-A) and section 23 (1), that the Court is under a duty to see under section 23 (1) whether the petitioner under section 13 (1-A) is disabled by his conduct subsequent to the decree which may again amount to taking advantage of his own wrong⁴⁴⁹. Yet another view is that the concept of wrong-disability which was hitherto the sole basis of relief under the Act has now in part given way to the concept of a broken-down marriage irrespective of wrong or disability, and that it is not permissible to apply the provisions of section 23 (1) based as they are on the concept of wrong-disability to proceedings in which relief is claimed under section 13 (1-A) or section 13-B based as they are on the concept of a broken-down marriage.⁴⁵⁰ At any rate the wrong or disability contemplated by section 23 (1) (a) is not the non-resumption of cohabitation or the non-restitution of conjugal rights which is the basis of section 13 (1-A).⁴⁵¹ It is not possible to spell out under section 13 (1-A) any obligation against the petitioner to give any assurance to the respondent, all that was required was non-resumption of cohabitation for the requisite period after the passing of a decree for judicial separation.⁴⁵²

(446) *Madhakar v. Saral*, (1972) 74 Bom. L.R. 496; 1973 Bom. 55.

(447) *Narasimha Reddy v. Boonamma*, 1976 A.P. 77 at 78.

(448) *Laxmikhal v. Laxmichand*, 1968 Bom. 332; *Chennamalai v. Mahender Dey*, 1968 Punj. 287; *Syal v. Syal*, 1968 Punj. 489; *Somaswara v. Lejanetti*, 1968 V ys. 274; *Jethabhai v. Manabhai*, 1975 Bom. 88.

(449) *Anil v. Sudhakar*, 1978 Guj. 74, *Binita Devi v. Singh Raj*, 1977 P. & H. 167 (F.B.); *Geeta Devi v. Purshottam Gird*, 1977 Delhi 176.

(450) Per Chinnappa Reddy, J., in *Binita Devi v. Singh Raj*, supra at p. 177.

(451) *Ibid* at p. 178.

(452) *Madhakar v. Saral*, 1973 Bom. 55.

To deprive a defaulting party to a decree of restitution of conjugal rights of the benefit under Section 13 (1-A), his subsequent conduct must not be only mere non-compliance but must amount to a positive misconduct of such repulsive or shocking nature as would amount to his taking advantage of his own wrong.⁴⁵³

The fact that the decree-holder has not taken any steps to execute the decree or has not made even a demand for its compliance will not defeat his right to ask for divorce under this section since the compliance required is a compliance by the judgment-debtor; *Balak Rao v. Gurdas Singh*.⁴⁵⁴

Failure of the husband to execute the decree which he has obtained for restitution of conjugal rights does not amount to non-compliance of the decree so as to entitle the wife to seek for restitution of conjugal rights: *Kameshikumar v. Kartar Chand*.⁴⁵⁵

In *Someswar v. Leelavati* ⁴⁵⁶, it was held that where the wife returned to the husband after a decree for restitution of conjugal rights and lived in his house for sometime with the genuine intention of continuing to live there but had to leave the husband on account of his hostile attitude to her, the decree for restitution could not be regarded as not having been complied with within the meaning of Section 13 (1-A).

Resumption of cohabitation within the meaning of Section 13 (1-A) is resumption by volition of both parties or by reconciliation and not by way of a unilateral attempt by one of the spouses against the will of the other to resume cohabitation.⁴⁵⁷ Where the petitioner husband was not guilty of creating obstruction and on the other hand was found willing to take back the respondent and resume marital relations divorce cannot be refused to him.⁴⁵⁸ Approving the statement of the law by the Delhi High Court in *Ram Kali v. Gopal Das*⁴⁵⁹ and *Gajna Devi v. Parshoram*⁴⁶⁰ in holding that mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of Section 23 (1) (a), the Supreme Court has in *Dharmendra Kumar v. Usha Kumar*,⁴⁶¹ pointed out that the grounds for granting relief under Section 13 including sub-section (1-A) however continue to be subject to the provisions of Section 23, and that in order to be a wrong within the meaning of Section 23 (1) (a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct *serious enough* to justify denial of the relief to which the husband or the wife is otherwise entitled.

Cohabitation signifies the husband acting as a husband towards his wife and the wife acting as a wife towards her husband and his cherishing and supporting her. Sexual intercourse will be conclusive evidence of cohabitation; absence of it will not negative cohabitation.⁴⁶²

(453) *Anil v. Sugabehn*, 1978 Guj. 74.

(454) I.L.R. (1963) 2 Punj. 213; 1963 Punj. 493; *Suryakantam v. Ranga Rao*, (1973) 1 An. W.R. 158; (1972) 2 A.P.L.J. 26.

(455) 1962 Punj. 156.

(456) 1968 Mys. 274.

(457) *Varadachari v. Hanumantha Rao*, (1978) 1 An. W.R. 72; 1978 A.P. 6.

(458) *Rameshwar v. Kishanbhai*, 1975 Raj. 23.

(459) I.L.R. (1971) 1 Delhi 6 (F.B.).

(460) I.L.R. (1976) 1 Delhi 725; 1977 Delhi 178 (F.B.).

(461) 1977 S.C. 2213.

(462) *See Bhani v. Bhani*, (1947) 2 All E.R. 656; *Thane v. Thane*, (1948) 2 All E.R. 38.

The period of one year is to be reckoned from the date of the decree of the Court of first instance; likewise when an appeal was taken and the decree was confirmed. Where the first Court had dismissed the petition and on appeal a decree for judicial separation was granted, the period has to be reckoned from the date of the appellate decree. The appellate Court cannot ante-date the decree.⁴⁴³

13. Husband remarrying.—Section 13 (2) permits four additional grounds for a decree of divorce being made available to the wife only and not to the husband. The first is with reference to the second marriage of the husband and provides that in the case of any marriage solemnised before the commencement of this Act if the husband married again before such commencement, and the wife of the first marriage is also alive, then the wife married in the second marriage is entitled to present a petition for divorce. Similarly if prior to the commencement of the Act the husband had married again, the wife of the first marriage is entitled to present a petition for divorce on the ground of the second marriage, the wife of that marriage being alive at the time of the presentation of the petition. The reason of this rule is obvious. The policy of this Act is in favour of monogamy, and since it cannot pronounce as invalid the polygamous marriages that had taken place prior to the Act which were valid at the time in the particular community which was governed by a system of polygamous marriages, the Act enables the wife of any such marriage to free herself from the husband who has another wife alive at the time of the petition. This provision may enable either of the wives of the polygamous marriages entered into by the same husband to petition for divorce, and it may even happen that both of them may ask for divorce resulting, if divorce is granted, in the unenviable position of the husband being deprived of both the wives: *Smt. Venkatasamma v. Venkataswami*; ⁴⁴⁴ *Smt. Leela v. Dr. Rao Ananth Singh*.⁴⁴⁵ In such a case, it is open to the husband to contract a monogamous marriage under this Act. Where a petition has been filed on the ground of the husband marrying a second wife, the fact that subsequent to the petition he has divorced the second wife is no ground for dismissing the petition; *Mandal Nagamma v. Lakshmi Bai*.⁴⁴⁶ The fact that a wife who had been married prior to the Act had in spite of the husband's second marriage which had taken place prior to the Act had come to some compromise and lived with the husband for some time would not take away her right to present a petition for divorce: *Smt. Nirmoo v. Nikka Ram*.⁴⁴⁷ When petition for divorce is presented by the first wife on the ground that the husband had taken another wife before the Act, it is not open to the husband to plead any conduct or disability on the part of the petitioner as a bar to her claim for divorce on the ground of the second marriage: *Lakshamma v. Kannan*.⁴⁴⁸ A second wife entitled to relief under Section 13 (2) (i) would, by reason of Section 23 (1) (d) become disentitled to such relief by unnecessary or improper delay in instituting the proceedings.⁴⁴⁹

14. Rape, Sodomy or Bestiality.—Section 13 (2) (ii) provides that where after solemnisation of the marriage the husband is guilty of rape, sodomy or bestiality, that

(463) *Kirpalani v. Kirpalani*, 1960 Bom. 447.

(464) 1963 Mys. 118.

(465) I.L.R. (1963) 13 Raj. 425; 1963 Raj. 178.

(466) 1963 A.P. 82.

(467) A.I.R. 1968 Delhi 260.

(468) 1966 Mys. 178.

(469) *Alagarasami Chettiar v. Lakshmi Ammal*, (1972) 1 S.L.J. 187.

would be a ground for divorce. The misconduct of the husband must be after the marriage and not before, and it is not necessary that the husband should have been convicted for the offence committed by him. It is enough if the petitioner proves that the misconduct of the husband had taken place after the marriage, even though nobody else knew about it and the husband has not been brought to book in the Courts of the country for such offence.

A man is said to commit rape who has sexual intercourse with a woman against her will, or without her consent, or with her consent obtained by putting her in fear of death or hurt, or with her consent under mistaken belief that she is his wife when in fact she is not with or without her consent when she is under twelve years of age except when she is his wife. The fact that the husband has been convicted by a criminal Court only of an attempt to rape does not prevent the matrimonial Court from finding that there had been not merely an attempt but a completed act of rape attracting the jurisdiction to grant a decree for divorce. Sodomy or bestiality is committed by a man who has carnal intercourse against the order of nature with any man, woman or animal, it is a carnal copulation *per anum*, and even when the husband commits sodomy with his own wife, she not being a consenting party, a petition for divorce against the husband is maintainable: *C v. G* ⁴⁷⁰.

Bestiality is a crime of man with animals and beasts. It is a punishable offence under Section 377, Indian Penal Code.

15 Non-cohabitation after decree for maintenance.—A decree or order awarding maintenance to the wife under the Hindu Adoptions and Maintenance Act, 1956, or Section 155, Criminal Procedure Code, 1973, is treated on the same footing as an order or decree for judicial separation as an additional ground to the wife for divorce. Under Section 13 (2) (iii) the wife can claim dissolution of her marriage on the ground that subsequent to the passing of the maintenance decree or order, the spouses had not resumed cohabitation for a year or more.

16. Repudiation of marriage by wife married before attaining 15 years.—Though a marriage in violation of the age limit set in Section 5 (iii) is not rendered invalid, a wife whose marriage was solemnised before she had attained 15 years is given a right under Section 13 (2) (iv) to have her marriage dissolved. The right has to be exercised by the wife after attaining the age of 15 years but before completing 18 years.

Miscellaneous

17. Certain procedural matters.—Where an application for judicial separation was dismissed for default and was not restored, a subsequent application for divorce on the same cause of action is barred.⁴⁷¹ A fresh petition for divorce is maintainable by the husband on the ground of desertion after his petition for restitution of conjugal rights had been dismissed.⁴⁷² The principle of *res judicata* cannot be applied to cases where the ground taken is different.⁴⁷³ Merely because the trial Court which passed the decree described itself as

(470) 22 T.L.R. 26.

(471) *Majhi Kaur v. Gurdial Singh*, 1976 P. & H.L. 150.

(472) *Satinder Kaur v. Girdhar Singh*, (1976) 80 P.W.D. 128.

(473) *Poonam Chaudhary v. Ramji Chaudhary*, 1979 Dohi 32.

Small Cause Court, the order passed in the exercise of the special jurisdiction will not be ineffective and without jurisdiction.⁴⁷⁴

No evidence need be given by a party against an admission incorporated in the pleadings.⁴⁷⁵

A petition filed under Section 13 for dissolution which ended in judicial separation by consent of parties without providing any ground for the relief would be invalid.⁴⁷⁶

It is to be noticed that an unnatural offence committed by the wife is not made a ground of divorce at the instance of the husband. This appears to be a discriminatory concession to the softer sex.

***13-A. Alternate relief in divorce proceedings.**—In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (i), (vi) and (vii) of sub-section (1) of Section 13, the Court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.

NOTES

In cases where divorce is sought on the grounds of the respondent having ceased to be a Hindu by conversion or having renounced the world by entering a religious order or of his not being heard of for seven years or more the Court is not vested with any discretionary power. In other cases it can grant judicial separation.

***13-B. Divorce by mutual consent.**—(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

NOTES

Section 13-B is based on the concept of a broken-down marriage. It is impossible to apply the provisions of Section 23 (1) (a) to a proceeding in which relief is claimed under Section 13-B.⁴⁷⁷ It makes provision for divorce by mutual consent. On a joint petition by

(474) *Mital v. Premnath*, 1972 All 494; 1972 All. L.J. 442.

(475) *Selamete v. Sardari Lal*, 1971 Cur. L.J. 806; 1972 P. & H. 29.

(476) *Hirakshi v. Anandhi*, 1971 All 201.

(477) *For Chinappa Reddy J., in Simala Dal v. Singh Raj*, 1977 P. & H. 167 at p. 177.

⁴⁷⁸Inserted by Act LXVIII of 1976.

the spouses on the ground that they have been living separately for a year or more, that they have not been able to live together, and that they have agreed that the marriage should be dissolved. On the motion of both parties made not earlier than 6 months after the date of the presentation of the petition and not later than 18 months after the said date the Court after satisfying itself that the marriage was solemnised under the Act and the averments in the petition were correct shall pass a decree for divorce. There is nothing more to be proved in addition to that laid down in Section 13-B. The view that a ground which existed earlier, in addition to that contained in Section 13-B should also be proved would result in nullifying the very object of providing this new ground of divorce by insertion of Section 13-B. Adding any further requirement to that provided in Section 13-B is not even a reasonable and practical construction of the provision apart from being contrary to its clear meaning.⁶⁷⁸

Where divorce is sought by mutual consent under Section 13-B, the Court has to satisfy itself under Section 23 (1) (b) that such consent has not been procured by force, fraud or undue influence.

*14. No petition for divorce to be presented within one year of marriage.—(1) Notwithstanding anything contained in this Act, it shall not be competent for any Court to entertain any petition for dissolution of marriage by a decree of divorce, [unless at the date of the presentation of the petition one year has elapsed] since the date of the marriage:

Provided that the Court may upon application made to it in accordance with such rules as may be made by the High Courts in that behalf allow a petition to be presented [before one year has elapsed] since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent; but if it appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the [expiry of one year] from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the [expiration of one year] from the date of the marriage, the Court shall have regard to the interests of any children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties before the [expiration of the said] one year.

Synopsis.

1. Limitation for petition for divorce.
2. Cases of exceptional hardship.
3. Cases of exceptional depravity on the part of the respondent.
4. Premature presentation of the petition.

1. Limitation for petition for divorce.—The section lays down that normally it is incompetent for a Court to entertain a petition for dissolution of a marriage by a decree of

(678) *Arulankar v. Mada*, 1978 M.P. 44.

*Substituted by Act 68 of 1978, Section 9.

divorce unless at the date of the presentation of the petition one year had elapsed since the date of the marriage. The restriction is confined to petitions for divorce. But this period may work hardship in particular cases and may operate as an unnecessarily long period in the circumstances of any particular case, where there is absolutely no chance of a reconciliation between the parties or any reformation in respect of the charge on which the petition is contemplated to be based. That is why in the proviso to sub-section (1) provision is made for a petition being presented even before the expiry of the period where the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. Permitting such an exception to the statutory period for filing a petition for divorce, is governed by the rules that have been made by the High Court in that behalf and the application for permission to present a divorce petition before the expiry of the period has to be made in accordance with such rules. If it appears to the Court at the hearing of such an exceptional petition, that the petitioner obtained the leave by any misrepresentation of facts or concealment, the Court has two alternatives for the course to adopt in its discretion. One alternative is that it may pronounce a decree making it subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage. The other alternative is to dismiss the petition itself but without prejudice to any petition which may be brought after the expiry of one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed. Besides, in disposing of any application for leave to present a petition for divorce before the expiration of one year from the date of the marriage, there are two matters that have to be considered by the Court, (1) the interest of any children of the marriage and (2) the reasonable probability of reconciliation between the parties before the expiration of the said period. If in the interest of the children born of the marriage, it does not appear proper that such a petition for exceptional treatment of the case should be entertained then the petition may be dismissed or proper provision should be made for the custody and maintenance of the children of the marriage. So also if it appears to the Court that there is a reasonable probability of reconciliation between the parties before the expiration of the said period, the Court may dismiss the petition and leave the petitioner to institute the petition for divorce after the expiry of the normal period provided for under Section 14 (1).

2. Cases of exceptional hardship.—What is exceptional hardship or depravity has not been defined in the Act, because that must depend upon the facts of each case. If in addition to one of the grounds mentioned in Section 13 for divorce there are other aggravating circumstances such as cruelty or where there are more than one ground for divorce, as for instance, adultery and conversion: cruelty and venereal disease, renunciation of the world and absence of means of maintenance, they will be cases of exceptional hardship under which no spouse can reasonably be expected to put up with his or her lot any longer.¹⁷⁹ Other cases can easily be imagined of such exceptional hardship. For instance, if a husband coerces the wife to sexual intercourse with another abhorrent to her sentiments of morality or if the husband is such a confirmed and chronic addict to drink and narcotics that he creates a hell in the home as a matter of daily routine making the wife's position in the home absolutely impossible and has been at the same time living in adultery with another woman or if the husband has been incurably of unsound mind for the requisite period and is subject to frequent

(179) Cf., however *Verna Kumari v. Prem Kumar*, 1972 *Out. L.J.* 99.

fits of violence making it extremely risky for the wife to continue to live with him, an exception can be made for entertaining the petition before the statutory period.

In *Parvati Rao v. Pandurang*,⁴⁸⁰ it was held that a petition filed before the expiry of the prescribed period from the date of marriage on the ground that the petitioner wife was being mercilessly beaten by the husband for little or no reason could be entertained and ordered when that ground is made out, as that circumstance would well bring the case within the proviso to Section 14 (1).

3. **Cases of exceptional depravity on the part of the respondent.**—The depravity contemplated has reference to the morality or other conduct of the respondent—the respondent may be the husband or the wife. If it is the husband any conduct on his part which is so abhorrent that it will rouse both repulsion and indignation as for instance, his having intercourse with the servants of the house or his bringing a lewd woman into his bed chamber or masturbating in the presence of the wife or indulging in sodomy or bestiality to the disgust of the petitioner, will all be cases of exceptional depravity of the husband. Similar circumstances of conduct and life can be imagined in the case of a woman also. All these are merely illustrative of cases of depravity of an exceptional degree. Whether in any particular case the Court will come to the conclusion that a case of exceptional depravity has been made out or not will depend upon the nature of the misconduct and the frequency with which it is indulged in and the animus to inflict pain and misery upon the other spouse by such depraved conduct. In *Meganatha v. Sushila*,⁴⁸¹ the scope of the enquiry before the Court in the matter of admitting a main petition before the prescribed time on the ground of exceptional hardship or depravity was pointed out. It is for the judge who hears the application to say whether in the circumstances a *prima facie* case of exceptional hardship or depravity has been made out. In deciding this point, he is not expected to try the main petition in advance. He has merely to decide whether the allegations made in the affidavit on the application are such that if proved they would amount to exceptional hardship or depravity. Having found that there is a *prima facie* case, it is for him to say whether in the exercise of his discretion he will grant leave for the petition to be filed. It is immaterial that the evidence subsequently given at the hearing of the petition does not support the allegation of exceptional hardship or depravity, though if it appears that leave to file the petition was obtained by any misrepresentation or concealment of the nature of the case, the trial judge may if he pronounces a decree in it order that it shall not be made absolute until after the expiration of three years from the date of the marriage, or he may dismiss the petition without prejudice to any petition that may be brought after the expiration of the three years. The following general principles may be laid down for guidance in considering what would be treated as exceptional hardship or depravity:⁴⁸²

- (i) adultery with one person is not exceptional depravity;
- (ii) adultery aggravated by desertion in favour of another woman or cruelty to the wife would constitute exceptional hardship to the wife;
- (iii) wife having a child by adultery;

(480) 1959 Nag. L.J. (Notes) 78.

(481) 1957 Mad 423.

(482) *Boorman v. Boorman*, (1949) P. 358, Per Denning, L.J.

- (iv) husband committing adultery soon after marriage;
- (v) husband's adultery promiscuously with other women;
- (vi) adultery with the wife's sister or servant in the house;
- (vii) cruelty coupled with aggravating circumstances such as drunkenness and neglect.

Where a person married a girl and immediately drove her on to prostitution and profited by her immoral earnings, it would be a case of exceptional depravity.⁴⁸³

Section 14 providing restrictions is presumably designed to prevent hasty recourse to legal proceedings before the parties have made real effort to save their marriage from disaster. It is grounded on public policy because marriage is the very foundation of civil society and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming and if necessary of dissolving the marriage contract. *Megawatha v. Sushila*.⁴⁸⁴

4. **Premature presentation of the petition.**—A petition for divorce filed before the expiry of the period mentioned in Section 14 (1) has to be accompanied by another petition for permission to file it before the said prescribed time. The latter petition must disclose all the facts fully and frankly and should not be guilty of *suppresso veri* or *suggestio falsi*. No doubt in such a petition for permission for entertaining the main petition for divorce before the time prescribed, notice must go to the respondent, and if on such notice the respondent appears and shows cause why the petition for premature reception of the main petition should not have been entertained on account of the misrepresentation or concealment of the nature of the case, the Court has a discretion either to pronounce a decree and make it a condition that it shall not be operative until after the expiry of one year from the date of the marriage or it may dismiss the petition. Such a dismissal should not prejudice any fresh petition being filed after the expiry of one year from the date of the marriage upon the same or substantially the same facts as those alleged in support of the dismissed petition.

Grant or refusal of leave to sue within one year and where leave was granted *ex parte* to revoke it are matters of discretion with the Court. It is for the Court to say whether in the circumstances of evidence before it, a *prima facie* case is made out.⁴⁸⁵ An appellate Court will not interfere with the trial judge's discretion unless the latter had proceeded on a wrong principle of law or ignored a material consideration or gross injustice has been caused.⁴⁸⁶ The question of leave is decided mainly on the basis of the averments made in the affidavit filed in support of the application for leave. Affidavits if any filed in opposition may also be considered by the Court.⁴⁸⁷

(483) *Coleman v. Coleman*, (1866) 1 P. D. 81; *Sheldon v. Sheldon*, (1937) 106 L. & P. 44.

(484) 1957 Mad. 423.

(485) *Winter v. Winter*, (1944) P. 72, 74.

(486) 1957 Mad. 423; *Charlasky v. Charlasky*, (1947) 176 L.T. 592.

(487) *Winter v. Winter*, *supra*; *Simpson v. Simpson*, (1934) 2 All E.R. 546.

15. Divorced persons when may marry again.—When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

[* *]

Synopsis.

1. Scope.

2. re-marriage

1 Scope.—Section 15 relates to divorced persons and not to the persons who are not divorced. Hence its provisions are not applicable to a decree for nullity under Section 12.⁴⁶⁸ The section forms an integral part of a divorce proceeding by which both parties become free and are released to contract a fresh marriage.⁴⁶⁹ Reading this section with Section 28 it is clear that any party whose marriage has been dissolved may lawfully marry again where there is no right of appeal against the decree or if there is one the appeal time has expired without any appeal being preferred or where any appeal is preferred after it has been dismissed. The result of the deletion of the former proviso to the section which declared that it shall not be lawful for the parties to marry again unless at least one year had elapsed from the date of the decree in the Court of first instance by the Marriage Laws (Amendment) Act, 1976 is that now the parties can contract marriage soon thereafter, provided of course the period of appeal had expired.

Though the section does not in terms apply to an application for special leave to appeal to the Supreme Court, the successful party in the High Court who had obtained a decree for dissolution of marriage cannot by marrying again immediately after the High Court's decree deprive the losing party of the chance of preferring an application for special leave to appeal.⁴⁷⁰

A decree of dissolution of marriage concerns the status of the parties and operates as a judgment *in rem*,⁴⁷¹ and unless vacated according to law will not abate.⁴⁷²

The amendment of section 15 by the Marriage Laws Amendment Act LXVIII of 1976 had been made to take retrospective effect in the sense that it is applicable to all pending proceedings and those proceedings are to be decided as per the amended provisions. Hence Section 15 will have to be read as if there is no proviso.⁴⁷³ So where after dissolution of his marriage, the first plaintiff had married another woman within one year from the date of the dissolution, such marriage was legal and valid.⁴⁷⁴

2. Remarriage.—The Supreme Court has held in *Lila Gupta v. Laxmi Narain*,⁴⁷⁵ that the former proviso to Section 15 was directory in nature and therefore a marriage effected in

⁴⁶⁸ Proviso omitted by Act 68 of 1976, S. 16.

⁴⁶⁹ *Prasad Sharma v. Radha*, 1976 P. & H. 335.

⁴⁷⁰ *Worner v. Worner*, (1890) L.R. 15 P. D. 152.

⁴⁷¹ *Chandra Mohini v. Anand Prasad*, 1967 S.C. 581.

⁴⁷² *Siddick v. Panchalamma*, 1968 A.P. 156.

⁴⁷³ *Sumeda v. Panchajanya Rao*, 1957 A.P. 424. Cf., *Lila Gupta v. Laxmi Narain*, (1978) 2 S.C.J. 428; 1978 S.C. 1351, 1356.

⁴⁷⁴ *Chinnathay v. Narayanaswami*, (1978) 1 M.L.J. 49; 90 L.W. 702.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ (1978) 2 S.C.J. 428; 1978 S.C. 1351 reversing *Uma Chandra v. Raju*, 1971 Cr. 307.

violation of the time period specified therein is not void. In regard however to the validity of a fresh marriage contracted after divorce decree before the expiry of the period of limitation for presenting an appeal or where an appeal had been presented during the pendency of that appeal, it has been held under the comparable provisions of Section 37 of the Indian Divorce Act, 1869, that such a marriage is void.⁽⁴⁹⁶⁾ Pathak J. in *Lila Gupta's case*⁽⁴⁹⁷⁾ observes; "The main provisions of Section 15 of the Hindu Marriage Act which bear almost identical resemblance to the relevant statutory provisions in the cases mentioned above would perhaps attract a similar conclusion in regard to its construction: At the lowest, there is good ground for saying that a contention that a marriage solemnised in violation of the main provision in Section 15 is a nullity cannot be summarily rejected.....I refrain from expressing my opinion on the validity of such a marriage."

Neither this section nor the previous Section 14 will apply to a case either of judicial separation petition under Section 10 or nullity of marriage petition under Section 11 or voidable marriage petition under Section 12. This section applies only to petitions filed for dissolution of the marriage by a decree of divorce either under Section 13 or under the proviso to Section 14.

***[16 Legitimacy of children of void and voidable marriages.—(1)** Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.]

NOTES

This section states the legitimacy of children of void and voidable marriages. Sub-section (1) provides for the legitimacy of a child of a void marriage whether the child had been born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of the marriage under

(496) See *Warter v. Warter*, (1890) 15 P.D. 152; *Baile v. Brown*, 1916 Mad. 847; *Turner v. Turner*, (1821) Cal. 517; *Jackson v. Jackson*, (1912) 34 All. 205.

(497) 1976 S.C. 1351, 1362.

*Substituted by Act 68 of 1976, S. 11.

this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

As regards the issue of voidable marriages, sub-section (2) states that where a decree of nullity is granted, any child who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled is to be deemed their legitimate child despite the decree of nullity.

Under sub-section (3) any child of a marriage declared to be null and void or is annulled by a decree of nullity will not have any rights in or to the property of any person other than the parents in any case where but for Section 16 such child would have been incapable of possessing or acquiring any such rights by reason of his or her not being the legitimate child of its parents.

According to the Bombay High Court a son born of a void marriage is not entitled to share in property of which his father was a coparcener in a partition suit filed by the first wife and her legitimate son.⁴⁹⁸

17. Punishment of bigamy.—Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living, and the provisions of Sections 494 and 495 of the Indian Penal Code (XLV of 1860) shall apply accordingly.

Synopsis

1 Punishment for bigamy.

4 Constitutional

2 "Solemnized"

5 Forum of prosecution

3 Restraining second marriage

1 Punishment for bigamy.—This section provides that any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living, and the provisions of Sections 494 and 495 of the Indian Penal Code shall apply accordingly. For the section to apply two conditions should be satisfied. (a) the marriage should have been solemnized after the commencement of the Act, (b) at the date of the marriage either party had a spouse living. The voidness of the marriage under Section 17 is in fact one of the essential ingredients of Section 494, Penal Code because the second marriage will become void only because of the provisions of Section 17.⁴⁹⁹ It is however not necessary that a prosecution under Section 494, Penal Code should have been preceded by a declaration under Section 17 of this Act of the voidness of the second marriage.⁵⁰⁰ While this section deals with bigamous marriages contracted between two Hindus after the commencement of this Act, it does not mean that there could not have been bigamous marriages punishable under Sections 494 and 495 of the Indian Penal Code under statutes previously existing. A question may arise whether a marriage contracted by either spouse on account of the other spouse not having been heard of for more than seven years under Section 13 (1) (ii) of the Act will be punishable under the Penal Code as a bigamy.

(498) *Hemanta v. Dhondabhai*, (1976) 78 Bom L.R. 675; 1977 Bom. 191.

(499) *Gopal Lal v. State of Rajasthan*, (1979) 1 S.C.J. 823.

(500) *Chunamma v. Dalappa*, 1958 Mys. 147; *Smt. Padi v. Union of India*, 1963 H.P. 16, 18; *Trilokya Mohan v. State*, 1968 Anam 22, 23.

marriage, in view of the provision for a decree of divorce on the ground of such disappearance of the latter spouse under Section 13 of the Act. Cases have held that in such case there is no offence of bigamy because under the presumption of law permitted by Section 108 of the Evidence Act the absent spouse must be presumed to have died, releasing the other spouse from the obligations of the prior marriage. The cases decided on this question under Sections 494 and 495 of the Penal Code may well be referred to as throwing light on the proper effect and consequences of such a second marriage entered into *bona fide* in the belief that the other spouse of the former marriage was dead at the time.

2. "Solemnised".—In *Baburoo Shankar v. State of Maharashtra*⁽⁵⁰¹⁾ the Supreme Court ruled that the second marriage to come within the ambit of this section should have been performed or celebrated in due form with proper ceremonies and that in the absence of such celebration it cannot be said to be solemnised. Merely going through certain ceremonies with the intention that the parties should be taken to be married will not make the ceremonies prescribed by law or approved by any established custom. The words "whoever marries" must mean whoever validly marries and if the marriage is not a valid one according to the custom of the parties, no question of its being void by reason of its taking place during the lifetime of the husband or wife of the person marrying can arise. *Venkatalakshmi v. Paroophan nagayana*,⁽⁵⁰²⁾ *Bolaram v. Surya*⁽⁵⁰³⁾, (mere admission of the second marriage by the accused would not be sufficient to establish a valid second marriage to constitute bigamy); *Kanwal Ram v. Himachal Pradesh Administration*⁽⁵⁰⁴⁾ (mere admission of second marriage by accused is not evidence of the second marriage for the purpose of bigamy when there is evidence that the second marriage had not been performed with the appropriate ceremonies). *Kunchatapadam v. Soundara*,⁽⁵⁰⁵⁾ *Venkatasubbarayudu v. Venkataya*⁽⁵⁰⁶⁾. Where from the time of marriage the parties thereto have been received and recognised as man and wife a presumption of valid marriage between them arises and such presumption covers the question as to the performance of the requisite ceremonies of a valid marriage also.⁽⁵⁰⁷⁾ Where either the earlier marriage or the subsequent marriage has not been duly "solemnised" no question of bigamy can arise.⁽⁵⁰⁸⁾

In *Thokshan v. Baruniben*,⁽⁵⁰⁹⁾ it was held that where in a particular community it was very easy to get a divorce under the custom of the community and a husband marries again without getting the first marriage dissolved by the customary divorce, the offence of bigamy is to be punished lightly considering the offence only as a technical one.

3. **Restraining second marriage**—The Act carries no provision enabling a spouse apprehensive of the other spouse marrying again to obtain an injunction restraining such

(501) 1965 S.C. 1564. See also *Balakrishna v. Thirupathamm*, (1973) 2 A.N. W.R. 367.

(502) 1969 Cr. L.J. (A.P.) 836.

(503) 1969 A.M. 90.

(504) 1966 S.C. 614; *Priya Bala v. Suresh Chandra*, 1971 S.C. 1153.

(505) (1979) L.W. (Cr.) 257 (S.B.)

(506) 1968 A.P. 107.

(507) *R.N. Datta v. The State*, 1969 Cal. 55.

(508) *Ibid.*

(509) 1961 (2) Cr. L.J. 258.

spouse from doing so.⁵¹⁰ A regular suit will however lie under Section 9 of the Civil Procedure Code for an injunction perpetually restraining a spouse from contracting a second marriage.⁵¹¹

4. **Constitutionality.**—Section 17 does not offend Article 15 (1) of the Constitution.⁵¹² The provisions contained in Sections 5 (1), 11 and 17 making Hindu marriages monogamous are not *ultra vires* Article 14, 15 or 25 of the Constitution.⁵¹³

5. **Forum of prosecution.**—Prosecution under Section 494 of the Penal Code is to be in the Court having jurisdiction over the second marriage.⁵¹⁴

18. **Punishment for contravention of certain other conditions for a Hindu marriage.**—Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (ii), (iv), (v) and (vi) of Section 5 shall be punishable—

- (a) in the case of a contravention of the condition specified in clause (ii) of Section 5 with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;
- (b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of Section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both; and
- (c) in the case of a contravention of the condition specified in clause (vi) of Section 5, with fine which may extend to one thousand rupees.

NOTES

1. **Punishment for contravention of certain other conditions for a Hindu marriage.**—This section provides that every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (iii), (iv), (v), and (vi) of Section 5 is punishable. Clause (iii) of Section 5 relates to the condition that the bridegroom must have completed the age of 21 years and the bride the age of 18 years at the time of the marriage and if this condition is not observed either party to the marriage is punishable with simple imprisonment which may extend to 15 days or with fine which may extend to Rs. 1,000 or with both. The condition in clause (iv) of Section 5 relates to marriage outside the prohibited degrees and if this condition is contravened the punishment is simple imprisonment which may extend to one month or fine which may extend to Rs. 1,000 or with both. Clause (v) of Section 5 which deals with the prohibition of marriage within the sapinda relationship attracts for the contravention of that prohibition the penalty of simple imprisonment which may extend to one month or with fine which may extend to Rs. 1,000 or with both. Clause (vi) of Section 5 deals with the necessity for consent of the guardian for marriage with a girl where she had not completed the age of 18 years,

(510) *Trilochan Modi v. Jyotsna*, 1974 Pat. 335 (application by husband); See also *Uma Shankar v. Radha Devi*, 1967 Pat. 220; *Abolachar v. Kishan Rao*, 1958 Mad. 287.

(511) *Santhappa v. Basanna*, 1964 Mys. 247; *Sitopal v. Ramchandra*, 1936 Bom. 116 (F.R.).

(512) *Sankhadev v. Jayamma*, (1972) 1 An. W.R. 284; 1572 A.P. 156 (F.R.).

(513) *R.R. Singh v. J.N.R. Ojha*, *Hindu Law Digest*, 1980 Monitor 26; See further *Spec. of Bombay v. Narasappa*, 1936 Bom. 26; *Ram Prasad v. State of Uttar Pradesh*, 1967 All. 411.

(514) *Pandita Kalyanram, v. M.S. Krishnamurti*, 1967 Mad. 241.

and the contravention of this provision attracts a penalty of fine which may extend to Rs. 1,000.

The Court which can try an offence under Section 18 is the Court indicated in the Criminal Procedure Code.⁵¹⁵

There is one matter which deserves to be noticed in the construction of Section 18. It is not anybody and everybody who brings about a marriage in contravention of any of the conditions mentioned in the section that is punishable with the respective penalties. The section specifically says "Every person who procures a marriage of himself or herself to be solemnized". This means that it is the actual party to the marriage, namely, the husband or the wife that can at all come under the penal provision. There is a further question whether in the case of such a contravention, both the parties to the marriage are liable under the penal provisions or only that party who is more responsible for bringing about the alliance. The latter contention may receive support from the use of the expression "procures" which means "induces" in the context. No marriage can however, be brought about except with the consent of both the spouses, and if the female spouse happens to be a minor, without the consent of her guardian for the marriage. So both the parties to the marriage may be liable for the penalties prescribed, if the word "procures" is interpreted as "brings about". It appears that even in the case of a minor wife she will be liable on this interpretation though the consent of the guardian has been obtained for a marriage which contravenes clause (ii) (iv) or (v), of Section 5.

A further question also deserves consideration, namely, whether the parents, the parents-in-law and others who have helped or otherwise encouraged the alliance violative of any of the clauses mentioned here of Section 5, will also be liable as abettors of the offence under the abetment sections of the Penal Code. The answer appears to be in the affirmative. See the commentaries under Section 5.

Jurisdiction and Procedure.

*19. **Court to which petition shall be presented.**—Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction—

- (i) the marriage was solemnized; or
- (ii) the respondent, at the time of the presentation of the petition, resides; or
- (iii) the parties to the marriage last resided together; or
- (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at the time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive.

(515) *Rameshchandra v. Bhaskaran*, 1960 Kar. 234

*Substituted by Act LXVIII of 1976, S. 12.

Synopsis

1. Court to which petition should be made. 3. Temporary Residence.
2. Residence.

1. Court to which petition should be made.—This section sets out rules relating to jurisdiction of the Court for any proceeding under the Hindu Marriage Act.⁵¹⁶ It provides that every petition under this Act shall be presented to the District Court.⁵¹⁷ The jurisdiction of the other ordinary civil Courts like the Munsif's Court and the Subordinate Judge's Court is excluded regarding taking cognisance of any petition under the Act *Mary Margaret v. Premnathan*.⁵¹⁸ The District Court here means a City Civil Court where there is one and in any other area the principal civil Court of original jurisdiction including any other civil Court which may be specified by the State Government by notification in the Official Gazette as having jurisdiction in respect of the matters dealt with in this Act.⁵¹⁹ Under clause (i) the forum can be the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnised; under clauses (ii) and (iii) it can be the District Court within the local limits of whose jurisdiction the respondent spouse is residing at the time of the presentation of the petition or both the parties to the marriage last resided together. Under clause (iv) it can be the District Court within the local limits of whose jurisdiction the petitioner is residing at the time of the presentation of the petition in a case where the respondent is at that time residing outside the territories to which the Act extends or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of such person had that person been alive. Though the wording of the section may appear to be mandatory it would rather be in keeping with the spirit of the section to confine the mandatory provision "shall be presented to the District Court" and read the later part as to jurisdiction as not mandatory but a provision conferring jurisdiction.⁵²⁰ Neither Section 19 nor Section 21 limits the jurisdiction to that provided under Section 19 nor excludes the operation of the Civil Procedure Code.⁵²¹ Hence the civil Court's jurisdiction to hear suits or proceedings under Section 20 of the Civil Procedure Code is not excluded.⁵²²

The District Court hears petitions under the Act as a Court and not as a *persona*
...

The only Court that has jurisdiction under this section is the District Court and not any Subordinate Court unless it has been empowered in that behalf by a notification in the Official Gazette by the local Government. *Smt. Balwan Kumbhar v. Addl. Munsif, Dehra Dun*.⁵²³

(516) *Mandla Das Gupta v. Premchandra Kumar Singh*, 1960 Cal. 577; *Kamala v. Narayan*, 1966 Bom. 12.

(517) *Jasjit Dhillon v. Hardev Das*, 1958 Punj. 80; *Jaganmoy v. Chinnappa*, 1962 Mys. 139.

(518) (1955) 1 Andh. W.R. 398.

(519) *Laxman Singh v. Kishorilal*, 1955 M.P. 166; *Omprakash Singh v. Premchand*, 1972 All. 474.

(520) *Ganesh v. Narayana* (1973) 1 M.L.J. 346; 1973 Ind. 247.

(521) *Ibid.*

(522) *Ibid.*

(523) 1969 All. 7; See also *Shyam Lal Singh v. Shyam Lal Singh*, 1971 All. 576.

There is no jurisdiction in the High Court to entertain and dispose of a suit for declaration of nullity of a marriage even when the relief has been valued at an amount above the pecuniary limits of the jurisdiction of the City Civil Court since the City Civil Court has been given exclusive jurisdiction to entertain such petitions in matters arising within the local limits of its jurisdiction: *Monika Das Gupta v. Promode Kumar Rai*.⁵²⁵ Where the requirement of this section with reference to the jurisdiction of the Court in which the petition should be filed cannot be satisfied, Section 20 of the Civil Procedure Code, will apply and the petition can be entertained by the Court within whose jurisdiction the defendant resides or the cause of action is said to arise. *Hariram v. Jasim*.⁵²⁶

2 Residence.—The expression 'residence' does not take in merely casual or temporary visits,⁵²⁷ and denotes living in a place with the idea of making it a place for living for an indefinite duration for the time being. *David Denis v. Mrs. Esther Denis*,⁵²⁸ *Carol v. Carol*,⁵²⁹ *Robey v. Robey*,⁵³⁰ *Kershaw v. Kershaw*,⁵³¹ *Saraswathi Amma v. Kesavan*.⁵³² In Webster's dictionary "to reside" is defined as meaning to "dwell permanently or for a length of time" and words like dwelling place or abode and residence have been held to be synonymous.⁵³³ A person is said to reside in a place if through choice he makes it his abode permanently or even temporarily.⁵³⁴ He should have the intention to stay for a period, the length of the period depending upon the circumstances of each case. Intention to stay for an indefinite period is not a must.⁵³⁵ The authorities show that if a man had any kind of a fixed abode in a certain place, he must be regarded as residing there, although he might be temporarily absent for the purposes of health, pleasure or business.⁵³⁶ In one case,⁵³⁷ when the spouses were living at Mangalore in the husband's house he was having a lien on his post at the Telegraph Office, Rangoon but had no place there which he could call his residence, it was held that he cannot be deemed to be a resident of Rangoon. If during their temporary absence from their fixed abode the spouses had cohabited together in another place but had previously lived together at their home, they must be considered to have last resided together not in the place where they stayed on a fleeting visit but in the place where their home is situated and where they last cohabited. In *Junah Dulari v. Narain Das*,⁵³⁸ where after marriage the

(525) 1960 Cal. 577

(526) I.L.R. (1962) Bom. 554; 1963 Bom 176

(527) *Carol v. Carol*, 1953 All. 39; 1953 All. 385; *Walsh v. Walsh*, 1927 Bom. 230.

(528) 1951 Nag. 248. I.L.R. (1951) Nag. 493.

(529) 1933 All 39

(530) 1981 Cal. 121.

(531) 1930 Lah. 916.

(532) 1961 Ker. L.J. 1274.

(533) See *Lamb v. Symke*, 15 L.J. Ex. 287; *Alexander v. James*, 3 Ex. 133.(534) *Lalithamma v. Kuman*, 1966 Mys. 178; *A.J. Tullock v. H.P. Tullock*, 1925 Cal. 246 at 246.(535) *A.G. Tullock v. H.P. Tullock*, supra.(536) *Ordi v. Shimer*, 7 I.A. 196 at 205.(537) *D'Souza v. Loo*, 1940 Mad. 564.(538) 1959 Punj. 50; see also *Sandhu v. Har Kishan*, 1957 Punj. 241.

parties lived together in Amritsar for some months, the husband being employed there and subsequently the wife left for Gurdaspur where her sister was staying on account of misunderstanding and the husband paid a brief and flying visit to Gurdaspur for bringing about a reconciliation, it was held that the parties last lived together in Amritsar and not in Gurdaspur since the word "reside" implies something more than a brief visit, and that the Amritsar Court alone has jurisdiction to hear a petition by the husband for the restitution of conjugal rights. But if the man has no such fixed abode or home, the position will be different and the place where they last cohabited even though it was not a permanent place of residence would be considered as the place where they last resided together. *Ritchson v. Ritchson*.⁵³⁹ Residence does not imply that the parties must have a house of their own. It is sufficient to ascertain the place where both the parties lived together.⁵⁴⁰ The words "reside" and "last resided together" would not include casual visits without intention to reside.⁵⁴¹ For purposes of conferring jurisdiction the parties need not have the intention to reside together permanently.⁵⁴² Where the marriage was solemnised at Delhi and the parties last resided together at Chandigarh, the Court at Chandigarh will have jurisdiction apart from the Delhi Court.⁵⁴³ So also cases may arise where a man has two homes and both the husband and wife may be living in one home for some time and in the other for some other time. In such a case, both the places may be considered as places where they last resided together. The word "together" governs the immediately preceding words "last resided" and not the word "reside". *Hazel May Murphy v. L.E. Murphy*.⁵⁴⁴ What is contemplated under this section is a petition for relief like restitution of conjugal rights judicial separation, divorce, etc., and not a criminal complaint for an offence under section 494 or 495, Indian Penal Code, and a wife can therefore prosecute her husband for bigamy in the Magistrate's Court even after this Act had come into force; *Gouri Thimma Reddi v. State of Andhra Pradesh*.⁵⁴⁵ So also a right to maintenance claimable by a wife during the subsistence of the marriage can be agitated in a suit before the ordinary civil Court of the land under section 9 of the Civil Procedure Code without praying for any of the reliefs mentioned in the Hindu Marriage Act and section 19 of this Act is no bar to such a suit. *Channamma v. Subba Reddi*.⁵⁴⁶ In *Lalithamma v. Kanan*.⁵⁴⁷, it was held that where a husband lived in his father-in-law's place for some time to consummate his marriage with his wife he could be considered to have lived in that place for the purpose of residence under section 19 of the Act.

3. **Temporary residence.**—Where a person has a fairly permanent residence at one place, he cannot be said to have a residence at another place where he merely goes for a

(539) 1934 Cal. 570; *Jagan Mohan Rao v. Suresh*, (1977) 2 M.L.J. 77: 85 L.W. 484 [stay in Madras by the spouses for four days considered sufficient to give jurisdiction]. Cf., *Murphy v. Murphy*, I.L.R. 45 Bom. 517. 1921 Bom. 211; *Tara Singh v. Jugal Singh*, I.L.R. (1946) 1 Cal. 804.

(540) *Walsh v. Walsh*, 29 Bom. L.R. 308.

(541) *Dr. Srijaya v. Dr. Varadha Das*, 1973 All. 84; *Ashok v. Vishnu Bharti*, 1978 All. 18.

(542) *Santosh Kumari v. Om Prakash*, 1977 All. 97; *Jagjit Kaur v. Jaswant Singh*, 1968 [S.C. 1521 followed].

(543) *Sanku Dewan v. Afti Kumar*, 1973 P. & H. 256.

(544) 1951 All. 180; I.L.R. (1952) 2 All. 723.

(545) (1958) 1 Andh. W.R. 230.

(546) (1953) 1 Andh. W.R. 197.

(547) 1958-2 Mys. 178.

temporary stay without the intention of remaining there.⁽⁵⁴⁸⁾ In one case⁽⁵⁴⁹⁾, where a Military Officer attached to a regiment at Vellore took leave and stayed in Madras in a rented house for some time and then returned to Vellore, it was held that the latter place, namely, Vellore must be considered to be the place where he dwelt. It all depends upon the intention of the parties. In another case,⁽⁵⁵⁰⁾ a resident of Mysore which was his permanent place of residence went to Madras with his wife with the intention of staying there for several months, leaving the Mysore house in charge of his servants; it was held that he must be deemed to dwell in Madras. In the case of Government servants, they must be considered to be dwelling at the place where their service took them, even though they might have dwelling houses of their own in which their parents lived at another place, which they occasionally visited.

Where the spouses have no joint permanent home where they can reside together as might happen when both are permanently employed in different districts and the wife visited the husband's place for short intervals, the husband's place where they last resided together though for brief intervals would be the place where they "resided together".⁽⁵⁵¹⁾ It is the factum of residence and not its purpose that is material.⁽⁵⁵²⁾

20. Contents and verification of petitions.—(1) Every petition presented under this Act shall state as distinctly as the nature of case permits the facts on which the claim to relief is founded * [and except in a petition under section 11 shall state] that there is no collusion between the petitioner and the other party to the marriage.

(2) The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence.

Section 20 - Synopsis

1. Contents of petition.

2. Verified statements as evidence.

1. Contents of petition.—This section is a procedural section and states the requirements as to the contents and verification of the petition for any relief under the Act. It deals with the petition for any of the reliefs claimed, whether by way of restitution of conjugal rights or judicial separation or nullity of marriage or divorce. The facts on which the relief is asked for have got to be distinctly stated, and there must also be a statement that there is no collusion between the petitioner and the other parties to the marriage. The facts stated have got to be verified by the petitioner, and if the petitioner happens to be a minor, by his guardian or if he is a lunatic by a next friend or a person appointed in respect of his person by a Court of law. The verification should be in a manner required by law for the verification of plaints. One difference between the allegations in the plaint and the statements in the petition is that while the allegations in the plaint do not by themselves constitute

(548) *T. J. Ponn v. Rati Varghese*, 1967 Ker. 1 (F.B.).

(549) 5 M.H.Q.R. 471.

(550) 94 Mad. 257.

(551) *Sargis v. Emmanuel*, 1965 Mys. 12.

(552) *Sirokha v. Sirokha*, 1974 A.R. 36; *A.J. Tallah v. M.P. Tallah*, 1975 Cal. 248.

* Substituted by Act LXVIII of 1976, S. 13 for "and shall also state".

evidence in the case, the verified statements in the petition can be referred to as evidence. This is specially provided for under Section 20 (2). The various High Courts have made rules under Section 21 which would govern the proceedings under this Act and in other respects the proceedings shall be regulated as far as may be by the Code of Civil Procedure. Besides, there are also provisions contained in this Act relating to such proceedings, as for instance, Section 22 for conducting the proceedings *in camera* and prohibition of printing or publication of the proceedings, Section 23 for the decree being passed in the proceedings or its refusal in the particular circumstances mentioned therein, Section 24 dealing with orders for maintenance pending the proceedings and also the costs thereof, Section 25 dealing with alimony and maintenance, Section 26 regarding custody of minor children, Section 27 dealing with disposal of properties which belong jointly to both the spouses in any proceedings under this Act and Sections 29 and 33 dealing with the enforcement of decrees and orders and appeals therefrom.

Section 39 (1) (i) of the Marriage Laws (Amendment) Act, 1976, provides that pending petitions or proceedings shall be dealt with and decided as far as possible as if they had been instituted under the Act as amended in 1976. Under Section 39 (2) in pending petitions and proceedings, the Court should give opportunity to the concerned parties to amend the pleadings in so far as such amendment is necessary to give effect to the provisions of Section 39 (1).

2. Verified statements as evidence.—The provision for referring to the statements in the verified petition as evidence is, as already pointed out, a departure from the known position obtaining in civil Courts, namely, that the statements in the plaint or other pleadings, though verified by the parties concerned, are not evidence, though they may be put in cross-examination for contradiction of the evidence given by the party verifying. This however does not mean that the Court is bound to accept the statements in the petition without further evidence or corroboration. The expression used is "may be referred to in evidence" and not "shall be referred to in evidence". This only means that there is a discretion in the Court in appropriate cases to act upon the statements contained in the petition and that no legal objection to such a procedure can be urged as fatal to the conclusions drawn.

In *Premchand Hira v. Bai Gula*¹, in regard to a similar provision in Section 47 of the Indian Divorce Act, it has been held that the statements in the petition may be referred to as evidence at the time of hearing but the ordinary practice of the parties giving *oath* *scot* should invariably be followed in the absence of good reason to the contrary.

21. Application of Act V of 1908.—Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908 (Act V of 1908).

NOTES

The expression "as far as may be" in the section merely means that all those provisions of the Civil Procedure Code shall apply to proceedings under the Act which are neither inconsistent with any of the provisions of the Act, nor contrary to its scheme or purpose. Under this section all the powers vested in a civil Court under the Code vest in a Court trying a

petition under the Act. The amplitude of such powers is restricted only to the extent it is otherwise provided by the Act or rules framed thereunder. There is no particular provision in the Act restricting the Court's power to grant any relief other than the one specifically asked for in the petition if the facts and circumstances and the findings arrived at justify such grant. Nor is there any provision in the rules disabling a person from seeking the several reliefs in the alternative. Hence a Court trying a petition for divorce is not precluded from granting a decree for judicial separation.⁵⁵⁴ The words "as far as may be" in the section indicate that it is the procedure only that is to be regulated by the Code of Civil Procedure but not a substantive right like the right of appeal. The proceeding for divorce or any other relief under this Act being of a civil nature, it is but correct that this section should provide that it should be regulated as far as may be by the Code of Civil Procedure. At the same time, the proceeding under this Act is of a *sui generis* character affecting in a sense not merely the parties to the marriage but the society at large, and naturally the procedure has got to be moulded with reference to this consideration, and therefore this section provides for rules being made by the High Court, which may override with reference to any respect, the procedure provided by the Code of Civil Procedure. The Court has jurisdiction to allow amendment of petition for divorce by adding grounds for relief *Chucci v Chucci*,⁵⁵⁵ *Lewis v. Lewis*.⁵⁵⁶ The Court has power under this section in a proceeding under the Hindu Marriage Act to apply the provisions of Order 1, rule 10, Civil Procedure Code, to add a party,⁵⁵⁷ Order 9, rule 9⁵⁵⁸ and Order 9, rule 13, Civil Procedure Code *Sunanda v Gundo Pant*.⁵⁵⁹ There is however no provision in the Act whereby in a petition for divorce against the wife on the ground of adultery the husband can claim damages against the alleged adulterer: *Jaswanthai v. Vimal*.⁵⁶⁰

The provisions of Order 23, rule 3 of the Code, enjoining that the Court must pass a decree in accordance with a compromise arrived at between the parties are not, however, applicable in view of the provisions of Section 23 (1) of the Act.⁵⁶¹ In proceedings under the Hindu Marriage Act, the Court can exercise its inherent powers under Section 151, Civil Procedure Code.⁵⁶²

Where the right to continue an appeal does not survive, the sole respondent in the matrimonial proceedings having died, then the appeal as a natural consequence must abate. The effect of such abatement would be that the judgment given by the lower Court becomes conclusive as between the parties or their legal representatives.⁵⁶³

(554) *Manjit Kaur v Gurdial Singh*, 1978 P. & H. 150.

(555) (1958) 1 W.L.R. 463

(556) (1958) 2 W.L.R. 747.

(557) *Amenda Lakshmi v Bhadrara Narasimhan*, (1974) 2 A.P.L.J. 293; (1975) 1 An. W.R. 186; 1975 A.P.

80.

(558) *Manjit Kaur v Gurdial Singh*, supra *Tirukappa v. Kamalanatha*, 1966 Mys. 1.

(559) 1961 Bom. 225

(560) 1963 Gujarat 152.

(561) *Ramkumar v. Madanlal*, (1977) 79 Bom.L.R. 143.

(562) See *Malikhan Ram v. Krishna Kumar*, 1961 Punj. 42; *Aslie v. Bhimdev Chandra*, 1962 Cal. 88; *Tarishan Singh v. Mohinder Kaur*, 1963 Punj. 240; *Bhushan v. Dropta Bai*, 1963 M.F. 259; *Swaminath v. Ragunatha Reddy*, (1977) 2 An. W.R. 96

(563) *Sher v. Mansoor*, I.L.R. (1971) Bom. 815; 74 Bom.L.R. 414; 1971 Bom. 183.

***21-A. Power to transfer petitions in certain cases.—(1) Where,—**

(a) a petition under this Act has been presented to a District Court having jurisdiction by a party to a marriage praying for a decree for judicial separation under section 10 for or a decree of divorce under section 13, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under section 10 or for a decree of divorce under section 13 on any ground, whether in the same District Court or in a different district Court, in the same State or in a different State, the petitions shall be dealt with as specified in sub-section (2).

(2) In a case where sub-Section (1) applies,—

(a) if the petitions are presented to the same District Court, both the petitions shall be tried and heard together by that District Court;

(b) if the petitions are presented to different District Courts, the petition presented later shall be transferred to the District Court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the District Court in which the earlier petition was presented.

(3) In a case where clause (b) of sub-Section (2) applies, the Court or the Government, as the case may be, competent under the Code of Civil Procedure, 1908 to transfer any suit or proceeding from the District Court in which the later petition has been presented to the District Court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code.

NOTES

Section 21-A makes special provision for the transfer of certain proceedings under the Hindu Marriage Act. By virtue of Section 21, Hindu Marriage Act, it is to be held that this special provision excludes the general provisions in the Code relating to transfer. It cannot be contended that Section 21-A would apply only to the situations mentioned therein and that other situations would continue to be governed by Section 24 of Civil Procedure Code.⁵⁸⁴

The section is applicable only to petitions under Sections 10 and 13 and not to petitions under other sections, for instance section 9.⁵⁸⁵ The principle of the section is that the two Courts may not reach two different conclusions and, therefore, it is desirable that only one Court should decide both the cases. As to which of the two should be chosen to do so, preference is indicated for the Court which in point of time was first seized of a similar petition.⁵⁸⁶

***21-B. Special provision relating to trial and disposal of petitions under the Act.—(1) The trial of a petition under this Act shall, so far as is practicable consistently with**

(584) *Rama Kanya v. Ashok Kumar*, 1977 P. & H. 378.

(585) *Ibid.*

(586) *Omide v. Kishinder Kumar Sharma*, (1978) 81 PwJ L.R. 225. [Principle of the section was held applicable where two cases were pending in two different Courts seeking different reliefs, one for restitution of conjugal rights and the other for judicial separation].

Enacted by Act LXVIII of 1970, S. 14.

the interests of justice in respect of the trial, be continued from day to day until its conclusion unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of the notice of the petition on the respondent.

(3) Every appeal under this Act shall be heard as expeditiously as possible and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent.

NOTES

The section requires day to day hearing and disposal of petitions within six months of the service of the petition on the respondent, as far as possible. Likewise it enjoins the disposal of an appeal within three months of the service of appeal on the respondent.

***21-C. Documentary evidence**—Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence in any proceeding at the trial of a petition under this Act on the ground that it is not duly stamped or registered.

NOTES

The section provides for admissibility in evidence of documents which would not be otherwise admissible for not being duly stamped or registered.

****22 Proceeding to be in camera and may not be printed or published.**—(1) Every proceeding under this Act shall be conducted *in camera* and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.

Section 22—Synopsis

1. Publicity is the hall-mark of justice.

2. No discretion to Court

1. **"Publicity is the hall-mark of justice"**—In divorce proceedings and other proceedings account of the nature of the evidence to be given frequently in respect of very delicate matters which would be embarrassing to either party if the public is allowed to be present, it has been the practice even in the western countries to conduct them *in camera* when it is desired by either party or if the Court itself feels that that would be the proper procedure to be adopted. Under this section every proceeding under this Act shall be conducted *in camera*. As a corollary to this right, the further provision is made that it shall not be lawful for any person to print or publish any matter with relation to any such proceeding except with the previous permission of the Court. Sub-section (2) of section 22 lays down the

* Inserted by Act LXVIII of 1976, s. 14.

** Substituted by Ibid, s. 15.

penalty or fine which may extend to Rs. 1,000 in case of contravention of the prohibition against printing and publishing in respect of an unauthorised publication.

2 No discretion to Court.—As a general rule when the evidence is likely to be of a revolting character or wound or injure the susceptibilities and the finer feelings of either party to such an extent that it may seriously tell upon the mind or health of the party, a Court may well decide, though not moved to do so by either party, to conduct the proceedings *in camera*. But section 22 (1) is mandatory and the Court has no discretion in the matter. Every proceeding has to be conducted *in camera*.

*23. Decree in proceedings.—(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner, * [except in cases where the relief is sought by him on the ground specified in sub-clause (d), sub-clause (b) or sub-clause (c) of clause (ii) of Section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) Where the ground of the petition is the ground specified ** [*] in clause (i) of sub-section (1) of Section 13, the petitioner has not, in any manner, been accessory to or connived at or condoned the act or acts complained of or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

*** [(b) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by fraud or undue influence, and]

†(c) [the petition not being a petition presented under section 11] is not presented or prosecuted in collusion with respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, in such a case, but not otherwise, the Court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case to make every endeavour to bring about a reconciliation between the parties:

*** [Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of section 13;]

††(3) For the purpose of aiding the Court in bringing about such reconciliation, the Court may, if the parties so desire or if the Court thinks it just and proper so to do, adjourn

* Inserted by Act LXVIII of 1976, s. 16.

** Certain words omitted by Act LXVIII of 1976, s. 16.

*** Inserted by Act LXVIII of 1976, s. 16.

† Substituted by Act LXVIII of 1976, s. 16.

†† Inserted by Act LXVIII of 1976, s. 17.

the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the Court, if the parties fail to name any person, with directions to report to the Court as to whether reconciliation can be and has been effected and the Court shall in disposing of the proceeding have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the Court passing the decree shall give a copy thereof free of cost to each of the parties.]

Section 23—Synopsis.

- | | |
|--|---|
| 1. General. | 13. Evidence regarding restitution of conjugal rights. |
| 1-A. Scope | 14. Evidence regarding judicial separation |
| 1-B. Party taking advantage of his or her own wrong or disability. | 15. Sexual intercourse |
| 2. Petitioner conniving at the respondent's sexual intercourse with another. | 16. Nullity of marriage. |
| 3. Contumacious. | 17. Voidable marriages. |
| 4. Revival of condoned offence. | 18. Unsoundness of mind etc. |
| 5. Collusion | 19. Consent obtained by force or fraud |
| 6. Delay. | 20. Pre-natal pregnancy |
| 7. Unreasonable delay. | 21. Conversion to some other religion. |
| 8. Justification for the delay | 22. Renunciation of world by entering a religious order |
| 9. Other legal ground in bar of relief. | 23. Discretion to refuse decree |
| 10. Res judicata. | 24. Interim alimony |
| 11. Jurisdiction. | 25. Quantum of alimony. |
| 12. The duty of the Court before proceeding to grant relief | 26. Interim alimony to be ordered on a petition. |

1. **General.**—Section 23 is the decree section. It is perhaps the most important section enacted for the purpose of making the Court the final arbiter of the destinies of the spouses with due regard to their mutual relations so that any decree that may be passed conforms to moral standards expected and enforced between the spouses in the conduct of the petition. Even where a cause for relief on any of the grounds laid down in the Act exists the Court has to be satisfied of the conditions in clauses (a) to (e) of section 23 (1) ¹⁶⁷. Though the section uses the expression "if the Court is satisfied" and not the expression "if the Court is satisfied on evidence", the satisfaction of the Court has to be based on evidence let in the case. ¹⁶⁸ Proceedings under the Act being essentially of a civil nature the word "satisfied" in Section 23 means "satisfied on a preponderance of probabilities" and not satisfied beyond reasonable doubt ¹⁶⁹. The previous view now no longer tenable, was that the expression "if the Court is satisfied" means that the matrimonial offence should be proved beyond reasonable doubt ¹⁷⁰, the reason for insisting on this standard of proof being the grave consequence which follows a finding of guilt in matrimonial causes: *Ernest John White v. Mrs. Kathleen*

(567) *Dr. N.G. Dasgupta v. Mrs. S. Dasgupta*, 1975 S.C. 1594 at p. 1540; *Aspang v. Shapson*, 1972 Orissa 163; 1 L.R. (1971) Cut. 447.

(568) *Chhotelal v. Satish Devi*, 1975 Raj. 8.

(569) *Dr. N.G. Dasgupta v. Mrs. S. Dasgupta*, supra at p. 1540.

(570) *Smt. Hirabai v. Dr. R.A. Amstutz*, 1971 All. 201.

Olive White,⁵⁷¹ *Chandra Lesla v. Victor Mathew*,⁵⁷² The fact that the petition is not opposed or undefended does not exonerate the Court from this duty of being satisfied as to the sustainability of the petition: *Thompson v. Thompson*.⁵⁷³ The satisfaction of the Court under this section must be on the basis of the record in the case and not on mere probabilities or circumstances surmised or suspected: *Nuhai Kumar v. Anjali*.⁵⁷⁴ Consent of the parties to judicial separation or dissolution of marriage does not confer jurisdiction on the Court to pass a decree under section 23.⁵⁷⁵ Nor can an order allowing a petition under Section 12 (d) be passed on the ground that the respondent and her counsel were absent.⁵⁷⁶

1-A. Scope—Section 23 lays down the circumstances in which alone the Court can decree the relief claimed.⁵⁷⁷ Section 23 does not free the hands of the Court from the fetters of one year limitation which Section 12 (b) (ii) imposes in giving relief by having the marriage declared a nullity.⁵⁷⁸ Where a husband was unable to consummate the marriage and the wife continued to be a virgin at the date of the petition filed by her under Section 12 (1) (a), and he had not led evidence to show that he had cured himself of his incapacity to consummate the marriage he cannot seek from the Court another opportunity to prove his capacity to consummate the marriage.⁵⁷⁹

1-B. Party taking advantage of his or her own wrong or disability.—Cases of a party filing a petition for relief under this Act taking advantage of his or her own wrong can easily be imagined. A petitioner for restitution of conjugal rights may be shown to be one who does not deserve any sympathy at the hands of the Court on account of his or her being the guilty party responsible for the respondent going away and residing elsewhere. For instance, if a husband has been consistently callous and cruel to the wife and the wife has therefore to go away either in disgust or in fear, certainly the petition by the husband for restitution of conjugal rights will be dismissed, as, otherwise it will be permitting the petitioner to take advantage of his own wrong. So also in the case of a petition by the wife for a similar relief against the husband for desertion the husband can well plead in justification that the immoral habits and nagging nature of the wife were so intolerable that he could not put up with it any longer (*Parack v. Parack*).⁵⁸⁰ case of adultery of the petitioner) and therefore, had betaken himself elsewhere away from his matrimonial home. Similar circumstances in matters of judicial separation and divorce can easily be imagined. The rule set out in Section 23 (1) (a) constitutes an overriding provision based on the principle that a wrong-doer should not be permitted to take advantage of his or her own wrong while seeking relief under the Act.⁵⁸¹ For that

(571) 1058 S.C. 441.

(572) 1956 Hyd 144 (F.B.)

(573) 1941 R. 193; 14 R. 37; *Smt. Hirakali v. Dr. Anantli*, 1971 All 201, *Gayama v. Bhagwan* 1972 Orissa 163.

(574) 1968 Cal. 105.

(575) *Smt. Hirakali v. Dr. Anantli*, *supra*.

(576) *Rudramma v. Somashekharappa*, (1977) 1 Kar. L.J. 318.

(577) *Jasmit v. Gyanam Kaur*, 1975 Punj. 225.

(578) *Prasanna Bhowar v. Arjunappa Dasht*, 1976 Cal. 156.

(579) *Udaman v. Indrajit*, 1977 P. & H. 77.

(580) (1980) 1 All E.R. 555.

(581) *Tara Chand v. Navin Dutt*, 1977 P. & H. 300 at 302.

matter, it is necessary to take into consideration the conduct of the petitioner who approaches the Court for any relief under the Act. If he or she by his or her own misdeeds forces the other spouse to leave him or her and stay away, the petitioner cannot be allowed to take advantage of his or her own wrong and ask the Court to perpetuate it.⁵⁵² The "wrong" must be misconduct serious enough to justify denial of the relief to which the husband or the wife is entitled.⁵⁵³

It is held that section 13 (1-A) does not confer an absolute or unrestricted right on a party to obtain a decree for divorce and the Court must take into consideration section 23 (1) and not grant relief to a party who is taking advantage of his own wrongs.⁵⁵⁴ Another view is that it is not permissible to apply the provisions of section 23 (1) (a) based as they are on the concept of wrong disability to proceedings in which relief is claimed under section 13 (1-A) based as they are on the concept of a broken-down marriage.⁵⁵⁵ The Supreme Court's decision in *Dharmendra Kumar v. Usha Kumar*⁵⁵⁶ that the refusal of the wife who had obtained a decree for restitution of conjugal rights to receive or reply to letters written by her husband etc., even if true does not amount to misconduct grave enough to disentitle the wife to the relief of divorce suggests that section 23 (1) will apply to cases under section 13 (1-A) (ii). Any way the conduct which should weigh under section 23 (1) has no reference to remitting the wrong which led to the decree of judicial separation or restitution of conjugal rights, but it must be in the nature of subsequent conduct of the petitioner which may be so reprehensible or repulsive to the conscience of the Court that to grant a decree to such party committing the wrong would be giving premium to such wrong.⁵⁵⁷ Living separately by the wife after a decree for restitution of conjugal rights against her could not be regarded as a "wrong" because no injury was caused to the other side.⁵⁵⁸ Where a husband remarried and deserted his wife in the wake of his remarriage whereupon the wife was granted a decree of judicial separation and the husband applied for dissolution of his marriage, section 23 (1) (a) was held to apply leading to dismissal of his petition.⁵⁵⁹ Where a wife petitioned for judicial separation on the ground of the husband having married again the husband cannot be allowed to defeat the petition on the ground that the wife's refusal to live with him was the cause of the second marriage. In such a case it cannot be said that the wife was taking advantage of her own wrong: *Mohanlal v. Mohan Bai*⁵⁶⁰ *Jenkin v. Jenkins*⁵⁶¹ see also *Brown v.*

(552) *Tarachand v. Nayana Devi*, 1977 P. & H. 300 at 301.

(553) *Dharmendra Kumar v. Usha Kumar*, (1977) 2 S.C.J. 471 1977 S.C. 2218.

(554) *Laxmibai v. Laxmicand*, 1968 Bom. 332; *Chamackal v. Mohinder Dev*, 1968 Punj. 287; *Syal v. Syal*, 1968 Punj. 489, *Sengupta v. Lodawathi*, 1968 Mys. 274.

(555) *Per Chinnappa Reddy, J.* in *Binita Devi v. Singh Raj*, 1977 P. & H. 167 (F.B.).

(556) *supra*.

(557) *Anil v. Sydhoben*, 1978 Guj. 74; see also *Madhubar v. Saral*, (1972) 74 Bom. L.R. 496; 1973 Bom. 55; *Jathabal v. Manabai*, 1975 Bom. 88; *Gajna Devi v. Parushotham*, 1977 Delhi 178.

(558) *Binita Devi v. Singh Raj*, *supra*.

(559) *Raghuvar Singh v. Setpal Kaur*, 1973 P.N.J. 117.

(560) 1928 Raj. 71.

(561) (1956) 2 All E.R. 596.

Brown.⁵⁵³ The principle that no party to a matrimonial cause shall be allowed to take advantage of his or her own wrong was considered in the case of *Day v. Day*.⁵⁵⁴ It was laid down that in the case of desertion on which a petition is filed for relief if it is found that the petitioner has committed adultery, that does not necessarily terminate desertion if the respondent did not know of the adultery, and that even if it was known the respondent's conduct was not in anyway affected by it. Whether even then the petitioner is not entitled to relief is a matter to be left to the discretion of the Court. But if the adultery of the petitioner was prior to the desertion alleged, the burden is on the petitioner to show that the desertion was not the result of the petitioner's adultery but was due to other causes not attributable to the plaintiff's fault or default in the matrimonial conduct.

2. *Fertilester committing at the respondent's sexual intercourse with another.*—Section 13 (1) (c) provides for a petition being presented for a decree of divorce on the ground that the other party has after the solemnisation of the marriage had sexual intercourse with any person other than his or her spouse. If in a particular case it is shown that the petitioner has been accessory to or connived at or condoned the act complained of in the petition and on which the petition is based, the petition is liable to be dismissed. "Accessory" signifies aiding in producing or contributing to produce an act.⁵⁵⁵ Connivance is the corrupt consenting of a married party to that conduct of the other of which complaint is afterwards made. It may be the passive permitting of the misconduct as well as the active procuring of its commission. Connivance on the part of the subscribing spouse to the wrong-doing of the offending spouse being an implied consent thereto, one cannot be considered to be injured by or heard to complain of what has been consented to. It is immaterial that the offending spouse was ignorant of the other's connivance of the wrong-doing. Such connivance may be by the wife at the husband's misconduct or it may be by the husband at the wife's misconduct. In either event, it will be a ground for dismissing the petition in the interests of the public.

Connivance implies knowledge of and acquiescence in the act complained of.⁵⁵⁶ Conniving at adultery means refusing to see an act of adultery but not taking any steps to prevent the adulterous intercourse.⁵⁵⁷ Where the husband knew that the association between his wife and another person would lead to adultery but made no effort to prevent it, it would be connivance.⁵⁵⁸ Similarly an agreement between the spouses that the husband shall commit adultery with a view to enable the wife to obtain divorce would amount to connivance.⁵⁵⁹ In the absence of the intention on the part of the husband that his wife should commit adultery, it cannot be said that connivance by him at her misconduct has been established: *K.G. v. K.*⁵⁶⁰ But mere imprudence, inattention, or negligence of the husband to the conduct of the wife cannot constitute his connivance at the wife's adultery in the absence of a positive intention on his part that she should commit adultery. Thus, if a husband arranges that his wife and a third person should occupy the house for an evening without interference or interruption and have them secretly watched with a view to find out if adultery is committed by his wife,

(552) (1956) 2 All E.R. 1.

(553) (1957) 1 All E.R. 848.

(554) *Gipps v. Gipps & Hume*, 38 L.J. P. & H. 161.

(555) *Manning v. Manning*, (1950) 1 All E.R. 602; *Gipps v. Gipps & Hume*, 11 H.L.C. 1.

(556) *Gipps v. Gipps & Hume*, *supra*.

(557) *Manning v. Manning*, *supra*.

(558) *Todd v. Todd*, L.R. 1 R. 734.

(559) 1932 Mag. 595; 1 L.R. (1932) Mag. 570.

the husband's object being that it should be committed on account of the opportunity thus afforded, so that he could claim divorce based upon such adultery, and the wife innocent of the said arrangement goes to the house and commits the misconduct, it would be held that there has been a connivance by the husband and therefore he is not entitled to a decree on the ground of the wife's adultery.⁶⁰⁰ The connivance may be by the husband or at his instance by his agents. In other words, if the agent of the husband either himself procures the wife's adultery by having intercourse with her or aids and abets another to bring about the wife's misconduct, in either event the husband must be held guilty of the connivance so as to disentitle him to a decree of divorce on the ground of wife's adultery.⁶⁰¹

Merely separation or desertion by one spouse of the other does not amount to a connivance though it does afford opportunity for the other to commit adultery, because in such a situation it cannot be posited that the husband or the wife intends that the other should commit the adultery.

A question may arise whether the adultery by the respondent will not be a ground for divorce or for judicial separation where the adultery committed by the respondent is one in addition to or different from that connived at by the petitioner. The answers to this question have not been uniform. But it appears to be the preferable view and stands to sense that since the petitioner has connived at the respondent's misconduct intending that the respondent should commit adultery even though the adultery intended was committed with a different person, the petition should be dismissed on account of the connivance. But connivance within the meaning of section 23 (1) (b) relates only to a connivance at the act charged in the petition. This clause does not postulate that a petition cannot be maintained on account of the adultery merely because some other adultery committed has been connived at by the other spouse when another misconduct not connived at has been committed on which the petition is based. In other words if the petition, for instance, for judicial separation is founded on a sexual intercourse had by the respondent and with reference to that no connivance of the petitioner can be found, then that would be a ground for decreeing the petition. But if on the other hand that is the very misconduct which is the foundation of the petition and it has been found that has been connived at the petition has got to be dismissed.

The provisions of section 23 (1) (b) do not apply to a petition for divorce under section 13 (2) by a wife.⁶⁰²

3. Condonation.—Section 23 (1) casts an obligation on the Court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if the Court is satisfied "but not otherwise" that the petitioner had not in any manner condoned the offence.⁶⁰³ It is necessary that there should be evidence on the record of the case showing condonation.⁶⁰⁴

Condonation means forgiveness of the matrimonial offence and the restoration of the offending spouse to the same position as he or she occupied before the offence was committed.

(600) *Cf.*, however *Douglas v. Douglas*, (1950) 2 All E.R. 748.

(601) *Cf.*, *Adams v. Adams and Hargrett*, (1850) 1 All E.R. 607.

(602) *Nirmoo v. Nikhu Ram*, 1968 Delhi 268.

(603) *Dr. N.G. Datta v. Mrs. S. Datta*, 1975 S.C. 1554. See also *Manilal v. Gangabai*, 1979 Crd. 86.

(604) *Ibid*; See also *Ramesh Chandra v. Nandini*, 1979 (1) C.W.B. 17.

To constitute condonation there must be two things: forgiveness and restoration.⁶⁰⁵ There is no condonation unless conjugal cohabitation has been resumed or continued.⁶⁰⁶ Intercourse is not a necessary ingredient of condonation, though intercourse would raise a strong inference of condonation with its dual requirement of forgiveness and restoration.⁶⁰⁷ Condonation has been defined to be the forgiveness,⁶⁰⁸ either express or implied, by a husband of the wife or by a wife of a husband, for a breach of marital duty with an implied condition that the offence shall not be repeated. It is, however, something more than forgiving, in that there must be a resumption or continuation of the matrimonial status and cohabitation, *Gopi v. Hirya*.⁶⁰⁹ *Smt. Saptami Sarkar v. Jagadish*.⁶¹⁰ It may more properly be described as a blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed. As a general rule, the condonation of a marital offence deprives the condoning spouse of the right thereafter of seeking relief under the Act for the condoned offence. Thus adultery, cruelty, pre-nuptial unchastity, or pregnancy, and all other marital injuries are condonable offences. However, the doctrine is not applicable to a cause of divorce of a continuing character such as incurable leprosy or communicable venereal disease.

Condonation is not revocable and therefore unless forfeited by subsequent conduct, it is a complete bar to any petition based on the same offence. (*Durga Bai v. Naran Mathur*,⁶¹¹ there cannot be a conditional compromise to the effect that a party can at any time raise the question of the condoned offence.) It does not, however, operate prospectively so as to bar relief on the ground of an offence subsequently committed. Nor does the condonation of one offence warrant an inference that all existing offences of which the petitioner was not aware have been forgiven. Forgiveness implicit in condonation may mean in respect of all past acts of misconduct known to the other party. In such a case any petition based upon a misconduct not known to the condoning party at the time of condonation has not to be dismissed. Raydon on Divorce defines condonation at page 139 (of the V Edition) as follows: condonation is reinstatement in his or her former marital position of a spouse who has committed a matrimonial wrong of which all material facts are known to the other spouse; *Burk v. Burk*.⁶¹² In case of adultery with the intention of forgiving and remitting the wrong on condition that the spouse whose wrong is so condoned does not thereafter commit any further matrimonial offence. Condonation therefore consists of a factum of reinstatement and "*animus remittendi*." It is question of fact and it is immaterial that the guilty spouse does not consent to the condonation; *Wilmog v. Wilmog and Martin*.⁶¹³ In *Cramp v. Cramp and Freeman*,⁶¹⁴ it was held that a resumption of sexual intercourse by the husband with his wife with the full knowledge of her adultery is conclusive proof of condonation and cannot be rebutted by

(605) *Dr. N.G. Dastane v. Mr. S. Dastane* 1975 S.C. 1504 at p. 1545.

(606) *Smt. Kamey Banerjee v. Sujata Banerjee*, (1986) 70 Cal. W.N. 633.

(607) *Dr. N.G. Dastane v. Mrs. S. Dastane*, *supra*.

(608) *Chandragopal v. Rajwan*, 1956 Bom. 91.

(609) 1935 Nag. 49.

(610) (1948) 75 C.W.N. 502.

(611) 1935 Mad. 800.

(612) (1951) 1 W.L.R. 480.

(613) (1948) 2 All E.R. 123.

(614) 1920 Prob. 168.

evidence that he never forgave her, though that fact is admitted by the wife: *Benton v. Benton*.⁶¹⁵ *Marczuk v. Marczuk*.⁶¹⁶ The reason is that it would be repugnant to decency to allow a husband to say that he has had sexual intercourse with the wife and yet did not forgive her as he would thereby be approbating and reprobating the marriage; it ought not to be allowed.

To constitute condonation, the condoning party must have had knowledge at the time of condonation that the other party was guilty of the act condoned: *Bhagwan Singh v. Amar Kuar*.⁶¹⁷

Where a husband knowing that his wife had committed adultery had continued to cohabit and live with her and subsequently on the basis of such misconduct on the part of his wife managed to get a decree for divorce from the High Court against which the wife had obtained leave to appeal to the Supreme Court, and the husband soon after married and begot a child on the second wife and applied for revocation of the leave to appeal on the ground of his second marriage and the issue thereof, it was held that the conduct of the husband in continuing to live and have intercourse with his wife even after his knowledge of her misconduct amounted to condonation within the meaning of Section 23 of the Act, and the High Court was in error in granting a decree for divorce in the circumstances, and in any event the husband could not have the leave granted for appeal revoked on the ground of his second marriage. Section 16 would apply to the child of the second marriage: *Smt. Chandramohini v. Arinash*.⁶¹⁸

4 Revival of condoned offence.—In all condonation there is implicit a condition that no further matrimonial offence shall occur.⁶¹⁹ A condonation is cancelled if a further matrimonial offence is committed after the condonation⁶²⁰ though such matrimonial offence may be of a different type, or not *ejusdem generis* with the original offence or, is of a type which does not give a ground of relief.⁶²¹ Thus in the case of adultery condoned, subsequent gross familiarities by the person excused with the stranger with whom the offence was committed, will be sufficient to cancel the condonation *K. G. v. K.*,⁶²² *Viola Duncan v. George Duncan*.⁶²³ so also subsequent desertion by the husband for however short a time can revive a condoned adultery: *Beigan v. Beigan*.⁶²⁴

(615) (1957) 3 All E.R. 544.

(616) (1955) 3 All E.R. 758.

(617) 1962 Punj. 144; *Khairati Lal v. Pushpa Rani*, 1973 P. & H. 271; see also *Emmanuel v. Mandakini*, 1946 Nag. 69 at 71.

(618) 1967 S.C. 581.

(619) *Bisney v. Bisney*, (1898) 68 L.T. 498.

(620) *Emmanuel v. Mandakini*, 1946 Nag. 69.

(621) See *Constance v. Henry*, 47 Cal. 1068; *Pranabhai v. Bai Gopal*, 51 Bom. 1026; *King v. King*, 47 All. 30 1927 All. 237; *Gopi v. Hira*, 1935 Nag. 49.

(622) 1952 Nag. 395; I.L.R. (1962) Nag. 570

(623) 1939 R. 352.

(624) (1956) 2 All E.R. 630.

Where under a compromise in a wife's petition for judicial separation and maintenance on the ground of cruelty the wife went to live with the husband but being again ill-treated she left the husband; it was held in the husband's petition for restitution of conjugal rights that the wife could set up the defence of previous cruelty.⁶²⁵

Where however a wife had agreed for valuable consideration not to take proceedings against her husband in regard to his past cruelty she will be precluded from complaining of such cruelty when he subsequently commits adultery.⁶²⁶

Though not pleaded, the Court will take note of condonation if proved at the hearing.⁶²⁷ In such a case the Court will also admit evidence of misconduct subsequent to such condonation, notwithstanding that such misconduct has not been pleaded.⁶²⁸

5. Collusion.—If a petition for any of the reliefs under the Act is brought in collusion or prosecuted in collusion with the respondent then it should not be decreed. Collusion is an expression which implies acting together for the mutual benefit of both. Thus a petition for dissolution of marriage on the ground of adultery may be filed by the husband in collusion with the wife because both of them are interested in having the marriage dissolved with a view to each of them marrying somebody else. Collusion is an illicit, secret understanding by which parties who are jointly furthering a common purpose assume the semblance of hostility: *Hall v Hall*⁶²⁹. Collusion in matrimonial proceedings is regarded as a fraud on the Court, however meritorious the cause for divorce may be. It is an expression generally defined as an agreement, express or implied, between husband and wife made with a view of enabling one to procure a divorce from the other, that one of them shall commit, appear to commit, or be represented in Court as having committed, a breach of matrimonial duty declared by statute to be a ground for relief by such divorce. Connivance and collusion are closely related with this difference that connivance is a corrupt consenting of one spouse to the conduct of the other to which complaint is afterwards made, while collusion is a corrupt agreement between the husband and wife for the procurement of a divorce. Such collusive agreement in a divorce proceeding would include not only agreement whereby a valid defence is suppressed but also agreement for making no defence. Along with other circumstances the failure of the respondent to appear and defend may itself be evidence of collusion. Every agreement to obtain a divorce cannot, however, be termed collusive. That must depend upon whether it is in pursuance of an agreement to obtain a divorce not justified by the real facts or whether it is intended thereby to practise a fraud on the Court. In Raydon on Divorce, V Edition, page 136 collusion is defined as follows:

"Collusion means an agreement or bargain between the parties or their agents whereby the initiation of the suit is procured or its conduct provided for. It applies particularly to an agreement not to be present even when the agreement is disclosed to the Court and where no one is able to indicate any fact which is being falsely dealt with or withheld;

(625) *Jeevarathnammal v Srinivasu*, 1964 Mad. 482; I.L.R. (1964) 2 Mad. 579; 77 M.L.W. 290.

(626) *Rao v. Rao*, 6 F. D. 98.

(627) *Dr. N.G. Dastane v. Mrs. S. Dastane*, 1975 S.C. 1584; *Lloyd v. Lloyd and Hill*, (1947) F. 86, 91; (1947) 1 All E.R. 383.

(628) *Suggate v. Suggate*, 1 S. & T. 482.

(629) 1983 Sind 70.

because the Court cannot allow itself to be hampered in ascertaining for itself whether there is danger of a husband or wife obtaining a divorce contrary to the justice of the case. It is, however, open to a party to show that the negotiations with a view to a collusive bargain were abortive or that the collusive agreement is wholly spent in its operation, and therefore even though a petition is dismissed for collusion, it does not prevent a fresh suit free from collusion being afterwards brought but not by supplementary petition."

At page 138 occurs this passage.

"The fact that both spouses desire a divorce does not make them guilty of collusion, provided they have not entered into any agreement obnoxious to the Court; and an agreement between the parties not involving an imposition on the Court or a suppression of facts but merely facilitating proof and smoothing the asperities of litigation is not collusive or otherwise objectionable, though it is liable to be looked into by the Court."

Collusion in this section means collusion in the proceedings pending and not collusion in some other proceedings. In *Butler v. Butler*,⁶³⁰ it was held that the fact that the husband had in a previous suit been guilty of collusion would not disentitle him to relief in the present suit. The object of this provision for dismissing the petition on the ground of collusion between the parties is to compel the parties to come into the Court of divorce with clean hands. It is to oblige them to bring all material and pertinent facts to the notice of the Court, to prevent the blinding of the eyes of the Court in any respect, to oblige them so to act as to enable the Court to be in a position to do justice between the parties. *Butler v. Butler*,⁶³¹ In *Harris v. Harris*,⁶³² in an undefended suit filed by the husband for divorce, the petitioner's wife furnished a photograph of herself to the petitioner's solicitor and attended the hearing to enable her identification, and the petitioner's solicitor paid some money to her for the help thus rendered. In spite of this, the Court held that there had been no collusion between her and the petitioner and that a decree should be pronounced.

Every matrimonial proceeding is a triangular contest, the Court being a party along with the two spouses, and since no fraud ought to be played on a Court if the Court finds that there has been such a fraud, because collusion is only a species of it, it must set its foot on it with all the power at its disposal, and refuse the relief asked for however well-founded it may be. Especially in divorce matters, the power of granting a decree should not be used without attentive circumspection and unremitting vigilance: *W. D. v. E. D.*⁶³³ The dismissal of a petition on the ground of collusion does not however prevent either party from filing a fresh petition which is free from collusion and getting a decree for the relief sought.

The fact that both spouses desire a divorce does not make them guilty of collusion provided they have not entered into any agreement obnoxious to the Court.⁶³⁴ The same principle will apply to a decree for nullity.⁶³⁵ There is generally a presumption against

(630) 1893 Probate 185

(631) 15 P.D. 66.

(632) 31 L. J. P. and M. 160.

(633) 1933 Sind 27.

(634) *Sushanta v. Rajinder Kishore*, (1975) 77 Panj. L.R. (D) 79

(635) *Ibid.*

collusion⁶³⁶. The fact that the respondent also wants a dissolution of the marriage does not necessarily import collusion between the spouses⁶³⁷. The Court can examine the admission of guilt by a spouse to see if there is any collusion⁶³⁸. If the Court is satisfied about the absence of collusion, it may act on the uncorroborated confession of adultery by a party to the proceedings⁶³⁹.

6. **Delay.**—In a matrimonial proceeding, the Court is not bound to pronounce a decree if the petitioner is guilty of unreasonable delay⁶⁴⁰. Section 23 (1) (d) enables the Court to refuse relief even under the sections kept free from the bar of limitation in case the parties approach the Court after unnecessary and improper delay⁶⁴¹. It is implicit in the expression "unnecessary or improper delay" that the absolute bar envisaged under section 23 (1) can operate only where the delay is culpable⁶⁴². Before the Court grants relief it must be satisfied that the delay is not due to any such reason as acquiescence in the injury or indifference to the same or some wrong motive for seeking relief after sleeping over the matter for an inordinate period⁶⁴³. The Court cannot be used as a place to which the spouses can resort whenever it suits him or her to do so keeping in the meantime the threat of action ["Brahmarthram"] in reserve against the other spouse and use it after a long time at the slightest provocation at a moment the petitioner thinks suitable.⁶⁴⁴ A petitioner for a relief in respect of a matrimonial offence is not entitled to slumber over his rights but must come to the Court as early as possible because when a man delays, the Court can easily presume that he has not got a serious complaint or that the proceeding is a collusive one. *Manohar v. Chandraswami*⁶⁴⁵, *May v. James*.⁶⁴⁶ Though this is the outside presumption in most of the cases, there are exceptional circumstances which may be urged as justification for the delay in the presentation of the petition by the petitioner. *Bannur v. Retana*.⁶⁴⁷ So far as India is concerned, a spouse especially amongst Hindus, be it the wife or the husband, is not expected to rush to the matrimonial Court for the relief immediately a matrimonial offence is discovered. Brought up in an atmosphere of general patience and forbearance, it is rarely that either spouse is provoked to resort to the Court even under the stress of the worst matrimonial offence. Owing to the multifarious reforms that have been undertaken in the interest of women and to their advantage, with the object of placing them on the same footing as the male sex and owing also to the spread of education among the women-folk in the country, there is now a general awakening of the softer sex to their rights and a general drive

(636) *Emmanuel v. Emmanuel*, (1945) 2 All. E.R. 494.

(637) *Kishore Sahu v. Sushagraban*, 1945 Nag. 185.

(638) *Arnold v. Arnold*, 38 Cal. 907.

(639) *John Owe v. Maryal Owe*, 27 Bom. L.R. 251; 49 Bom. 468.

(640) *Anna Sahab v. Tarabai*, 1970 M.P. 38; *Lakshmi Ammal v. Alagiriwami*, (1975) 1 M.L.J. 728.

(641) *Pranab Bhow v. Madhuprasad Das*, 1976 Cal. 156.

(642) *Lalithamma v. Kanna*, 1966 Mys. 178.

(643) *Lakshmi Ammal v. Alagiriwami*, *supra*.

(644) *Ibid*; *Llavorijm v. Llavorijm*, (1955) 2 All. E.R. 110; *King v. King*, (1930) 57 Cal. 215.

(645) 1936 Nag. 26.

(646) 1941 Rang. 110.

(647) 1986 Jabb. L.J. 690.

to putting them on a position of equality with the male section of the community, a drive which has borne fruit in an Article included in the chapter on Fundamental Rights of the Indian Constitution. Right through one finds in the various sections of the Hindu Marriage Act a treatment which does not differentiate between one sex and the other. When the question comes to be adjudged regarding the respective rights, one ought not to shut one's eyes to the background of the Hindu society and the instinctive reluctance especially amongst the women to come to Court and air their grievances against the husbands. So even though the enactment governing the Hindu marriages has been placed on the statute book, in the future cases that the Courts have to decide with respect to matrimonial offences, the petitions from women are not to be expected to be filed immediately the foundations for the petitions have been laid. All the same, the section provides, that any unnecessary or improper delay will have the result in the dismissal of the suit. The development of the society in the west has proceeded on different lines altogether, the community always looking to the future ready to forget the past. In India the development of the society is always based upon the bedrock of the past and the future is looked up to not as something superior or better but as something which is unknown and may possibly be the worse. It is in this conservative background that the administration of matrimonial justice is to be conducted. If delay alone is to be as it is in the west a fatal objection to the maintainability of a petition for relief on the ground of matrimonial offence, be it adultery, be it cruelty, be it venereal disease or any other ground to be found in Sections 10, 12 and 13 most of the petitions may have to be dismissed. Even in the west delay has not always been looked upon as a fatal objection. There is always a marginal discretion given to the Court to ignore the delay even when there is not a very cogent justification for it. In India that discretion must be generously exercised owing to the newness of the rights, the time that must necessarily elapse before the community can be educated into the new order of matrimonial privileges that has dawned upon the Hindu community and as already said the general reluctance and apathy on the part of the people to resort to the Courts. At the same time if even with a due margin for excusing the delay on account of the nature of the Hindu community, its history and background and the sudden newness of the new order of society that is inroading into their culture, there is a feeling in the Court that the delay is still unreasonable and improper there is undoubtedly a competent jurisdiction in the Court to dismiss the petition *Shanti Devi v. Ramesh Chandra*⁽⁶⁴⁸⁾ (petition for restitution of conjugal rights after ten years of separation).

The position has been fully set out in *Chinnaperumal v. Mariyase*⁽⁶⁴⁹⁾ thus "No general rule can be laid down as to in what circumstances delay should lead to the non-suiting of an application under the Hindu Marriage Act, for the very simple reason that the delay may be the result of different causes in different cases, for example there is the delay which is intentional and which amounts to acquiescence in which case assistance should be refused straight-away. Then there may be what might be called the delay of optimism, namely the aggrieved party still hopes very often on a slender basis that things can be patched up and therefore avoids pushing matters to an issue; and where the indications are such the delay should not lead to the unsuiting of the party who after prolonged optimism is disillusioned and goes to seek the assistance of the Court.

(648) 1969 Pat. 27

(649) (1976) 1 M.L.J. 85 at 89 1576 Mad. 179.

Then there is the delay of apathy especially, on the part of the women, who generally speaking, are more helpless, than the men in the corresponding class and in such case the party just lets things drift without really grasping the legal consequences and after some years suddenly realises the extremely precarious position to which it has brought itself and then starts about so as to do something. Then there is the delay caused by the party experiencing difficulty in gathering sufficient funds for the expenses of initiating and continuing the proceedings.

Therefore, the Court should be guided to some extent by the humanitarian principle. The Court should also remember that delay, even when it raises the presumption of acquiescence is liable to explanation and the explanation whatever its worth should be given due consideration.

The modern trend is to exercise a liberal discretion in cases where relief would have been refused on the ground of unnecessary delay. All these would show that an opportunity should be given to the party to explain the delay and the Court should consider the explanation and then decide whether the petitioner should be unsuited on account of the delay.⁶⁵⁰ Delay, however long, is not by itself a bar in a nullity suit, but is relevant when considering want of sincerity, that is, such conduct on the part of the petitioner as ought to estop that person.⁶⁵¹ The onus of proving that the delay is inexcusable is on the respondent.⁶⁵² In an *ex parte* case the Court itself may take the objection in obvious cases.⁶⁵³ Where a husband filed a petition for divorce four or five years after he came to know of his wife's adultery and gave no reason for the delay, a divorce can be refused on the ground of delay alone.⁶⁵⁴

If the mere circumstance that there has been delay is sufficient to defeat a decree, every petition based on a charge of nullity would be defeated, for in our society both the husband and wife generally wait and take decisions to go to Court when everything else has been tried and failed. It is only when matrimonial life becomes intolerable that a party resorts to Court. Where a home is irretrievably broken and the marriage wrecked, the suffering should not further be protracted by dismissing the petition on the ground of delay.

The test is whether the delay is culpable or whether it is in the nature of a wrong. That is why the modern trend is to exercise a liberal discretion.⁶⁵⁵ Evidence must be given to explain the delay.⁶⁵⁶

7. Unreasonable delay.—The delay must be unreasonable in all the circumstances of the case before it will have the effect of a fatal objection to the maintainability of the petition for relief on account of any of the matrimonial offences mentioned in the Act. *Sastoriam v.*

(650) *Chinnappaiah v. Marayyan*, (1976) 1 M.L.J. 85 at 89; 1976 Mad. 179.

(651) *Vinod Chandra v. Aruna*, 79 Punj. L.R. 221; 1977 Delhi 24.

(652) *Ibid.*

(653) *Ibid.*

(654) *Thimmappa v. Thimmamma*, (1972) 1 Mys. L.J. 251; 1972 Mys. 254.

(655) *Vinod Chandra v. Aruna*, *supra*.

(656) *Sastoriam v. Sastoriam*, 1949 Mad. 7.

Ganarinder, Kamalam,⁶⁵⁷ *Liameljn v. Liameljn*.⁶⁵⁸ Where an application was filed by the husband for restitution of conjugal rights long after the wife had left him and had even obtained an order for maintenance under section 488 Criminal Procedure Code, the application would be liable to be dismissed under section 23 on the ground of delay: *Tyja Singh v. Sarjit Kaur*.⁶⁵⁹ "Unreasonable" is an expression elastic enough to comprehend all the facts, features and circumstances of the case including the status of the parties, the nature of the offence and the sex of the petitioner. As between the sexes, on account of the proverbial patience of the mother when there are children of the marriage, the mother generally does not want to break up the matrimonial home on account of the misdeeds of the husband. It is not the same thing in India as in England that a divorced wife has to face. In England she may be the object of pursuit for the man as she has often a marriage portion that might have been settled on her and which she takes on divorce. In India a divorced wife is looked down upon and it is very rarely unless she has alluring means that she can attract men to marry her. Any woman who has been divorced by her husband though for a cause for which the husband is mainly responsible is looked down upon in India as an unwanted woman likely to pollute the pure streams of social life. Where the population of the female sex which is far in excess of that of the male sex is not able to find husbands for grown-up girls, to increase that number by allowing inroads by discarded or divorced women is not a matter which the society easily tolerates with equanimity, and every one who knows this attitude of her neighbours to a woman divorced generally shudders at the thought and prefers to put up with her matrimonial lot however intolerable it may be. So if she waits for some time for a short or long duration fervently praying to the Almighty that her husband might reform or that in the interests of the children born to her by the husband she should not break away from him throwing the children into the streets and the husband into the arms of another woman by marriage or otherwise, and is persuaded to come to Court when her position with the husband becomes absolutely impossible, that is, at a time long after the matrimonial offence which is made the ground of attack, any Court if apprised of all the facts of the sufferings endured by the woman and the promptings of mother-hood which dissuaded her from the expedition in the matter of going to the Court for the relief, the Court will surely condone such delay as proper and reasonable and not unnecessary in the circumstances.

Where after becoming aware of the ground a wife chose not to invoke it in proceedings for divorce, but to cohabit with her husband and beget children and live merrily in her husband's home for a number of years and then to invoke the ground because of a misunderstanding which arose long after she entered into matrimony, the Court will have no option but to regard the delay as unnecessary and improper.⁶⁶⁰

Though the question of excusing the delay in the matter of the initiation of a matrimonial proceeding is one in the discretion of the Court, it ought not to exercise its discretion in favour of one who has slumbered in sufficient comfort for an inexcusably long time because the inaction on the part of the petitioner in such a case may be due to the fact that he is

(657) 1954 M. 1018.

(658) (1955) 2 All E.R. 110.

(659) 1962 Punj. 195.

(660) *Lakshmi Ammal v. Alagiriswami Chettiar*, (1975) 1 M.L.J. 228 at 231; 1975 M.D. 211. See also *Shanti Devi v. Ramji Chandra*, 1969 Pat. 27; *Thimmappa v. Thimmappa*, 1972 Mys. 294; *Chakrapani v. Sukha Devi* 1975 Raj. 8, *Mohinder Pal v. Kulwant Kaur*, 1976 Delhi 141.

not sincere in his complaint and that he has acquiesced in the wrong or condoned it. *King v. King*,⁶⁶¹ *Boulting v. Boulting*,⁶⁶² *Allen Robert Shah v. Mrs. Emily May Shah*,⁶⁶³ *Phyllis Irene Highfield v. Douglas Highfield*,⁶⁶⁴ *Nicholson v. Nicholson*.⁶⁶⁵ This however does not mean that in every case of delay, the Court is bound to dismiss the petition. *Joseph William Caroll v. Joseph William Caroll*,⁶⁶⁶ as if the Court has no jurisdiction to decree the petition whenever there is a delay which is not reasonable. *Sarah Abraham v. Pyli Abraham*.⁶⁶⁷

In *Nirmoo v. Nicktaram*,⁶⁶⁸ it was held that the mere fact that the first wife came to Court with a petition for divorce on the ground of her husband's second marriage 11 years after the Act came into force was not a ground for dismissing the petition for delay where it is found that the petitioner was provoked to file the petition on account of the harassment of the husband in respect of the property of the wife.

8. Justification for the delay.—The words used in the clause being “unnecessary or improper”, there is a large latitude left to the Court in the matter of excusing the delay. The use of these expressions show that every delay is not a ground for dismissing the petition. The delay must be either unnecessary or improper. The Court will be inclined to excuse the delay for various reasons, i.e., want of means and poverty on the part of the petitioner, her regard for the feelings of the other members of the family and the honour and prestige of the family, her fear of scandal and a desire to avoid a final break-up, if possible, and her expectation that there were reasonable chances of reconciliation.⁶⁶⁹ The following have been held to be justifiable grounds for ignoring the delay:

- (a) Poverty and want of means always considered as sufficient ground for excusing the delay: *Phyllis Irene Highfield v. Douglas Highfield*,⁶⁷⁰ *Constance v. Henry*.⁶⁷¹ But before poverty can be accepted as a ground it should be clearly and convincingly established: *Short v. Short*.⁶⁷²
- (b) Anxiety to avoid publicity and scandal for the sake of the children⁶⁷³ and the honour of the family in the hope that the respondent would reform till it becomes impossible to wait any longer has been held to be a sufficient ground having

(661) 1930 Cal. 418.

(662) 53 L.J.P. & M. 33.

(663) 1928 Lah. 320.

(664) 1935 Sind 112.

(665) L.R. 3 P. 53.

(666) 1934 Pat. 475.

(667) 1939 Car. 75.

(668) 1968 Delhi 260.

(669) *Alagirisami Chettiar v. Lakshmi Ammal*, (1972) 1 ELL.J. 187.

(670) 1935 Sind -112.

(671) 57 L.C. 216.

(672) 1974 L.R. 3 P & D. 198; *Prasad Kumar, v. Deepa Bai*, 1965 M.P. 191.

(673) *Siamon Stock v. Maragatham*, 1966 Mad. 224; *Aditya, Khandu v. William Alwar*, 1968 Cal. 133.

regard to the conditions of Indian society: *Niranjan Das Mahan v. Bas Mahan*⁽⁶⁷⁴⁾; *Newman v. Newman*.⁽⁶⁷⁵⁾

- (c) Delay due to honest effort to bring about a reconciliation between the parties has also been held to be a proper ground for excusing the delay occasioned by such effort: *Gopi v. Hiraya*.⁽⁶⁷⁶⁾ In this case the time taken by the husband to prevail on his wife to mend her evil ways was held excusable: *Carroll v. Carroll*.⁽⁶⁷⁷⁾
- (d) Wife's hope of reconciliation: *Fullerton v. Fullerton*.⁽⁶⁷⁸⁾
- (e) Consideration for the importunity of the mother to desist from precipitating a break in the family: *Newman v. Newman*.⁽⁶⁷⁹⁾
- (f) Patient endurance of cruelty by the wife to avoid shameful exposure: *Green v. Green*.⁽⁶⁸⁰⁾
- (g) Exigencies of wife's domestic service: *Davis v. Davis*.⁽⁶⁸¹⁾

(h) Discovery of the matrimonial offence only recently: *Brown v. Lloyd*.⁽⁶⁸²⁾ In *Margfield (falsely called Guno) v. Guno*.⁽⁶⁸³⁾ the reason for requiring delay to be explained to the satisfaction of the Court is given as that *prima facie* the mere fact of delay upon a complaint of a matter so fundamental to marriage raises doubts as to the reliability of the evidence of the complainant in support of the complaint. In *Batlington v. Batlington*.⁽⁶⁸⁴⁾ it was held that even where the grounds of complaint are well-founded, the delay is a cogent indication of the absence of a sense of injury. But the question as already observed is one essentially of the discretion of the Court, and while no doubt unnecessary and improper delay is a ground of dismissal of the complaint, in considering why is such delay there is a discretion in the Court which is elastic enough to be stretched for the purpose of rendering justice in any particular case so that where a home has been irretrievably broken and wrecked, the suffering should not be further protracted by dismissing the petition on the ground of delay which would serve the purpose of neither party and cannot in any way help the parties to set up a future home of harmony and peace which they could not find in the company of each other in the original home. *Clifford v. Clifford*.⁽⁶⁸⁵⁾

(674) 1943 Cal 146; I.L.R. (1943) 1 Cal 340.

(675) L.R. 2 P. 57.

(676) 1935 Nag 49; *Premade Kumar v. Daisy Bai*, 1965 M.P. 151.

(677) 13 Pat. 129. 1934 Pat. 475.

(678) (1922) 39 T.L.R. 46.

(679) (1870) L.R. 2 P. & D. 57.

(680) (1873) L.R.P. & D. 121.

(681) (1863) 3 S. & T. 221.

(682) (1937) 2 All E.R. 212.

(683) (1878) 42 L.J. (P. & M.) 65.

(684) (1874) 1 Ecc. & Ad. 257.

(685) (1948) P. 187; (1948) 1 All E.R. 394.

See also *Smt. Lata v. Dr. Rao Ananth Singh*,⁶⁸⁶ enumerating the various circumstances which have to be borne in mind by the Court when it is asked to condone the delay in filing the petition.

9 Other legal grounds in bar of relief.—Other legal grounds in bar of relief are found in Section 12 regarding consent obtained by fraud and premarital pregnancy, and the period of the ground of grievance mentioned in sections 11 and 13 and the time for presentation of the petition under section 14. Amongst the other defences outside the Act are *res judicata*, pendency of another proceeding, and want of jurisdiction in the Court to entertain the petition. Besides it would be contrary to all principle to allow a party to deceive the Court by *suggestio falsi* or *suppressio veri* and obtain an advantage from such deceit. *Kingdon v. Kingdon*.⁶⁸⁷

10. Res Judicata.—In *Thompson v. Thompson*,⁶⁸⁸ there is a well considered decision on the question of estoppel and *res judicata* in matrimonial Courts and how and subject to what qualification the principle that in a divorce Court estoppels bind the parties but not the Court has to be understood. The true proposition is that once the issue of matrimonial offence is litigated between the parties and decided by a competent Court, neither party can claim as of right to reopen the issue and litigate it all over again if the other party objects. This is what is meant by the statement that estoppel binds the parties. This however does not take away the right and the duty on the part of the divorce Court not to shut its eyes to the truth and in a proper case to reopen the issue or allow either party to reopen it despite the objection of the other party. This is meant by saying that estoppel does not bind the Court. Whether the Divorce Court should reopen the issue depends upon the circumstances of the particular case before it. If the Court is satisfied that in the previous litigation there had been a full and proper enquiry it will not normally allow another enquiry over again. But if the Court is not so satisfied it will consider it its duty to order a fresh inquiry into the case. If the Court does decide to reopen the matter, then there is no longer any estoppel on either party and each can go into the matter again. In applying these principles there are three categories of cases to be considered. The first category consists of those cases where a charge of matrimonial offence has been established in the previous proceedings where one party has been found guilty. In such a case as between the parties the strict rules of *res judicata* would apply though there is power in the Divorce Court to allow a departure from them. The second category is where a charge of matrimonial offence was previously made unsuccessfully and the accused was acquitted and the complainant then repeats the charge in a subsequent suit for divorce. The Court will not as a rule allow him to do this. The third category is where a charge of a matrimonial offence has been made unsuccessfully before a magistrate and the complainant repeats the charge in a subsequent suit for divorce. In such a case as between the parties the rules of estoppel would seem to apply, but the Divorce Court, which is bound by no estoppel, almost invariably investigates the charge afresh. The reason is that because it is known that magistrates are inclined to concentrate more on the question whether the husband ought to pay maintenance to the wife and less on the other issues, however relevant they may be. At any rate the Divorce Court does not consider it satisfactory to leave the matter to be conclusively determined by the magistrates. The Divorce Court regards their finding as evidence but not as conclusive on the issue.

(686) I.L.R. (1965) 13 Rajasthan 425; 1965 Rajasthan 178.

(687) (1958) 2 W.L.R. 310.

(688) (1957) 1 All E.R. 161. See also *Lata v. Lata*, (1955) 2 All E.R. 338, 548.

Whatever may be the position in England regarding the principles and practice on the question of the doctrine *res judicata* being applicable to divorce proceedings, so far as India is concerned the matter is governed by Section 11 of the Civil Procedure Code since the same is made statutorily applicable to the proceedings under this Act by the express provision in section 21 of the Act. Hence a decision on a prior matrimonial proceeding will be binding upon the same parties in a subsequent matrimonial proceeding and it is not open to either party to agitate again the same matter in a subsequent proceeding: *Colbis v. Collins*.⁶⁸⁹ In the case of *Gallins v. Collins*,⁶⁹⁰ it was held after a review of the authorities bearing on the question, that where a decree for a judicial separation has been once obtained on the ground of cruelty and adultery, a new petition asking for dissolution of marriage upon the same facts is not maintainable and that it would not only be contrary to the principle but inconvenient and in some cases highly unjust to permit a party to have two suits about the same matter. *Dwarika Bai v. Nainan Mathews*;⁶⁹¹ *Manjula v. Ganeshi*.⁶⁹²

Where a petition on the ground of sodomy was dismissed a subsequent presentation of the petition on allegations of adultery, desertion and cruelty will not be barred regarding adultery, desertion and cruelty.⁶⁹³ Findings in a petition by the husband for restitution of conjugal rights where defence of adultery and cruelty were set up would be relevant in a petition by the wife for dissolution of marriage but would not operate as *res judicata*.⁶⁹⁴

11. Jurisdiction.—In a proceeding under the Act it is open to the respondent to take objection to the jurisdiction of the Court to entertain the matter. Apart from the objections taken by one or other of the parties, it is a duty of the Court to inquire into and mention in its judgment the facts which give it jurisdiction to pass a decree.⁶⁹⁵ As stated earlier, the proceedings under the Hindu Marriage Act being of a civil nature, what is required is that the Court should be satisfied on a preponderance of probabilities and not satisfied beyond reasonable doubt.⁶⁹⁶ In matrimonial proceedings there cannot be judgment by default or admission.⁶⁹⁷ Respondent's failure to establish the defence does not mean entitlement of petitioner to relief.⁶⁹⁸ Where the Act itself has prescribed a period within which a petition for relief on a particular ground has to be presented the Court cannot entertain the petition after the expiry of the period.⁶⁹⁹

12 The duty of the Court before proceeding to grant relief.—Before proceeding to grant any relief under the Act, under Section 23 (2) it becomes the primary duty of the

(689) 56 Cal. 166; 1928 Cal. 806.

(690) *Ibid.*

(691) 1933 Mad. 792.

(692) 1940 M. 510; I.L.R. (1940) M. 319 5; L.W. 142 (1940) 1 M.L.J. 210.

(693) *Dwarika Bai's case*, *supra*.

(694) *Seethammai v. Thangaraj*, 1975 Karn. 23.

(695) *Kertham v. Kertham*, 1930 Lah. 916.

(696) *Dr. N.G. Dastane v. Mrs. S. Dastane*, 1975 S.C. 1534.

(697) *Sushila v. Mahendras*, 1950 Bom. 117.

(698) *Bentish Kaur v. Maher Singh*, 1964 Cr. L.J. 417.

(699) *Finch v. Ningappa*, 1903 Mys. 3.

Court in the first instance, in every case where it is possible to do so consistently with the nature and circumstances of the case to make every endeavour to bring about a reconciliation between the parties.⁷⁰⁰ Cases where estrangement between the spouses appears to be acute are no exception.⁷⁰¹ Under the proviso to the sub-section when matrimonial relief is sought on any of the grounds set out in clauses (ii) to (vii) of section 13 (1) the Court need not make an attempt to bring about reconciliation.

The words "in the first instance" in section 23 (2) indicate that the Court's endeavour must be before the granting of relief.⁷⁰² It may be in the initial stage or at a later stage, whenever the Court finds it possible to do so regard being had to the nature and circumstances of the case.⁷⁰³ The effort should be sincere and effort should not be given up merely on the ground that counsel for one or both parties had stated that there was absolutely no chance for reconciliation.⁷⁰⁴ The provisions of the sub-section are mandatory.⁷⁰⁵

Merely because the Court can desist in certain cases from reconciliation effort the Court is not relieved at all from exercising its power and discharging its duty under the sub-section.⁷⁰⁶ A decree passed (for instance for judicial separation) without endeavouring to bring about reconciliation cannot be maintained.⁷⁰⁷ The appellate Court also has to observe the procedure in section 23 (2) while disposing of appeals under the Act.⁷⁰⁸

Section 23 (2) does not apply to a case where one of the parties seeks restitution of conjugal rights.⁷⁰⁹

Under section 23 (3) the Court for the purpose of reconciliation can refer the matter to a third party named by the parties to the proceeding or named by the Court. It is open to the Court while disposing of the proceedings under the Act to have due regard to the reconciliation proceedings and the conduct of the parties therein.⁷¹⁰

13. Evidence regarding restitution of conjugal rights.—In a petition for restitution of conjugal rights the Court would consider the entire conduct of the parties and whether in the total situation the petitioner should be granted the relief and whether to grant it would not be unreasonable against the respondent in the particular case.⁷¹¹ The Court will in a husband's petition in the first instance, satisfy itself whether the petition is *bona fide* and is not

(700) *Rudramani v. Somanakharappa*, (1977) 1 Kair. L.J. 318, *Neta v. Kishan Swarup*, 1975 All. 337, *Suryakantam v. Ranga Rao*, (1973) 1 An. W.R. 158.

(701) *Chhota Lal v. Kamal Devi*, 1967 Pat. 269; *Jiva Bhai v. Lingappa*, 1963 Mys. 3.

(702) *Sabri v. Channarayal*, 1975 Raj. 134; *Raghunath Prasad v. Urmila Devi*, 1973 All. 203.

(703) *Raghunath Prasad v. Urmila Devi*, *supra*.

(704) *Ibid*.

(705) *Suryakantam v. Ranga Rao*, *supra*, *Annapurna v. Bhagben*, I L.R., (1971) Cut. 447; 1972 Orissa 153.

(706) *Anubhama v. Bhagben*, *supra*.

(707) *Ibid*.

(708) *Suryakantam v. Ranga Rao*, *supra*.

(709) *Ibid*.

(710) *Ramesh Chandra v. Premkshi*, 1979 M.P. 15.

(711) *Sarla Devi v. Ajit Singh*, 1973 Raj. 29; *Timmiah v. Timmiah*, (1953) 2 All. E.R. 187.

a device to avoid payment of maintenance which the wife was receiving.⁷¹² A pre-nuptial agreement by the husband to live at the wife's place is however, no bar to the husband insisting on the wife living with him wherever he decides to reside.⁷¹³ The petitioner has to prove first that there has been a valid marriage between the petitioner and the respondent, that the respondent has without reasonable excuse withdrawn from the society of the petitioner and the petitioner is therefore entitled to restitution of conjugal rights. It is open to the respondent in such a petition for restitution of conjugal rights to plead and prove that he or she had excellent reasons for separate living, that the fault for such separation lay with the petitioner and that the petition therefore could not be decreed *Cox v. Cox*.⁷¹⁴ The grounds for the defence may be the cruelty of the petitioner, or the petitioner's suffering from virulent form of leprosy or the fact that the petitioner is having venereal disease in a communicable form or that the petitioner is of unsound mind or has had sexual intercourse with another. In addition, the respondent can also plead that there was either no marriage at all or that the marriage was a void one and a nullity or that the other party was impotent and the marriage had been brought about without the consent and if the petitioner is the wife that she was pregnant by some other person at the time of the marriage. A further ground may also be that the petitioner has become a convert to another religion, or that he has renounced the world by entering a religious order or if the petitioner is the husband that he has another wife, or that he has been guilty of rape, sodomy or bestiality. In other words, all the grounds for relief by way of judicial separation or nullity of marriage or for divorce can be urged in defence to a petition for restitution of conjugal rights. In addition, other grounds based upon the improper conduct of the petitioner whether partaking of the nature of cruelty or of the nature of immorality or of such other conduct as makes the marital home impossible to live in may also be urged in defence. No doubt, the initial burden of proof is upon the petitioner to establish the averments in the petition. But the defences which are raised for having the petition dismissed had to be proved by the respondent with such evidence as will induce the Court to decide against granting the petition. The petitioner cannot, however, succeed merely because the respondent's defences have not been established.⁷¹⁵ The petitioner cannot take advantage of the weakness of the defence set up.⁷¹⁶

14 Evidence regarding judicial separation.—Judicial separation may be asked for now on any of the grounds for divorce specified in Section 13 (1) and (2). The standard of proof required is not proof beyond reasonable doubt but proof based on the preponderance of probabilities.⁷¹⁷ Proof beyond reasonable doubt was proof by a higher standard which generally governs criminal trials or enquires into issues of a quasi-criminal nature, and it is wrong to import such connotations into trials of a purely civil nature which proceedings under the Hindu

(712) *Sushil Kumari v. Prem Kumar*, 1976 Delhi 321; *B.B. Sjol v. Ram Sjol*, 1958 Punj 489; *Jaginder Kaur v. Shocharan Singh*, 1565 J. & K. 951; *Lucy v. Lucy*, (1931) 146 L.T. 48.

(713) *Potharaju v. Rangha*, 1965 A.P. 407. Cf. *Jagjit Kaur v. Ekam Singh*, 1975 P. & H. 355.

(714) (1958) W.L.R. 340.

(715) *Roharaj v. Ashit*, 1965 Cal. 62.

(716) *Karna v. Krishnaswami*, 1972 Mad. 247, 249; *Kanchalaya v. Lal Choudh*, 1972 Raj. 253, 255; *Roharaj v. Ashit*, supra; *Sadha Singh v. Jagadish Kaur*, 1969 Punj. 189; *Gurdev Kaur v. Sarwan Singh*, 1959 Punj. 162; *Mango v. Prem Chand*, 1962 All. 447.

(717) *Dr. N.G. Dasgupta v. Mrs. S. Dasgupta*, 1975 S.C. 1534.

Marriage Act are.⁷¹⁸ So far as desertion is concerned, it is to be proved in the sense of a deliberate withdrawal from joint life without the consent of the other *Visam v. Visam*⁷¹⁹ and both the ingredients, separation and the intention not to come back, should be established. To constitute just cause for one spouse living apart from the other, there must be a grave and weighty reason, that is conduct of such a kind as in effect makes the continuance of married life together impossible. Small and trivial matters if they fall within the ordinary wear and tear of married life have no legal significance *Postethusait v. Postethusait*.⁷²⁰ In defence to a petition for judicial separation on the ground of desertion, it is open to the respondent to plead and prove that the desertion was really on the part of the petitioner in that he or she by his or her conduct made it impossible for the respondent to lead the family life and therefore she was forced and entitled to live away. *Raj Bari Sin v. Rastiga*,⁷²¹ *Lola v. Manoharlal*.⁷²² In such a case, if the Court comes to the conclusion that the party really guilty is the petitioner, the petition has to be dismissed. It must be noticed that in the case of a petition for judicial separation, inasmuch as the object is to break the marital home the Court must insist upon the adducing of convincing evidence for granting the relief. So also when the petitioner proves his or her case and discharges the initial burden of proof, it is incumbent upon the respondent to prove the defence to the action with the same cogency of trustworthy evidence as is insisted on in proof of the petitioner's case.

Regarding cruelty which is not restricted to physical cruelty, it must be established that the cruelty on which judicial separation is asked for is of such a type that either there is a risk to life or limb or risk to the health of the body or the mind of the petitioner. Where the cruelty alleged is not bodily injury, or threat of such injury, but conduct, words and actions which tell upon the mind involving the risk to the petitioner's health, the evidence of such words or conduct should ordinarily not be confined to the evidence of the petitioner but has to be corroborated by the testimony of independent witnesses of either relations or friends or neighbours *Sarah Abraham v. Pyli Abraham*.⁷²³ The defence in such a case can only be the denial of the acts alleged and is of a negative character. Very often the evidence of cruelty relates to acts committed within closed doors in the absence of eye-witnesses to speak to the acts of cruelty. In such cases medical evidence of doctors who have examined the party wronged may well be pressed into service for the sufficiency or satisfaction necessary for the purpose, in addition to such evidence of neighbours who might have heard the cries or the words uttered during such acts.

Diseases: Two of the grounds of judicial separation which relate to the diseases of the respondent are the respondent suffering from a virulent and incurable form of leprosy and his suffering from venereal disease in a communicable form. Both these grounds are to be supported generally not only by lay witnesses but also by medical evidence.

Regarding unsoundness of mind also medical evidence may be insisted on besides evidence of lay witnesses, for it is often a matter of difficulty to decide whether the unsoundness of mind is of such a type as to support the petition for judicial separation. Besides, what is requisite

(718) *Dr. N.G. Dasgupta v. Mrs. S. Dasgupta*, 1975 S.C. 1534; See also *Shyam Nandan v. Shail*, (1978) 4 A.L.R. 882.

(719) (1926) 2 All Eng. Rep. 630.

(720) (1957) 1 All E.R. 909.

(721) 1935 M. 542; 56 M. 684.

(722) 1969 M.P. 349.

(723) 1969 Ker. 95.

is that the respondent has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that he cannot reasonably be expected to live with the respondent.

5. **Sexual intercourse**—In the case of a charge of adultery which is made a ground for judicial separation it had to be proved beyond reasonable doubt *Georgians v Edward Nathaniel*,⁷²⁴ *Ernest John White v. Kathleen Olive White*,⁷²⁵ *Galler v Galler*.⁷²⁶ This view does not now hold the field even in England due to the changed interpretation of the law in *Blyth v. Blyth*.⁷²⁷ What is required is proof by a preponderance of probability.⁷²⁸ Evidence of the other party to the adultery should be viewed as that of an accomplice with suspicion *William Kallan v. William Kallan*,⁷²⁹ but being in its nature secret in its operation requiring seclusion for indulgence, direct evidence of an act of adultery is so extremely difficult to obtain that insistence on it by Court may well amount to a denial of the legitimate protection of marital life. Couples may not be caught in the act even if indulgence in adulterous intercourse has continued for a long time because they always take precaution against red-handed detection. Hence to presume adultery when there is guilty association proved and opportunities for adulterous intercourse established will not be improper *Gopi v. Hriya*.⁷³⁰ *William Kallan v. William Kallan*,⁷³¹ *Patrick Donald Stracey v. Eileen Stracey*.⁷³² *Major Stanley Hugh Barker v. Patricia May Barker*.⁷³³ In other words the circumstantial evidence should be incompatible with the innocence of the party charged and should lead a just and reasonable man to the conclusion that the offence had been committed *Mr. Thomas v. Mr. Thomas*.⁷³⁴ *Coke v. Coke and Cook*.⁷³⁵ Direct proof of adultery being very rare, when it is adduced, the Court must look upon it with caution and disfavour on account of its improbability since no person can normally be expected to witness acts which are generally performed with utmost secrecy *Ramachandra v. Saraswati*.⁷³⁶ Adultery can be proved also by the admission of the party *Shiphani v. Piary*,⁷³⁷ (caution necessary); *Mahel Prabhudas v. Shahmbai*.⁷³⁸ and by the absence of access for sexual intercourse for longer than the period of generation of the child delivered by wife *Raymond*

(724) 1955 All 8

(725) 1954 Pat 560.

(726) (1954) 1 All E.R. 536.

(727) (1966) 1 All E.R. 524

(728) *Champa Gouri v. Jamnadar*, (1971) 1 A.P.L.J. 230, see also *Frem Marth v. Kumudini Bai*, 1974 M.P. 68; *Dr. N.G. Dastane v. Mrs. S. Dastane* 1975 S.C. 1534, *Shyam Narayan v. Shail*, (1971) 4 A.L.R. 382.

(729) 1938 Lah. 728.

(730) 1935 Nag. 49

(731) See foot-note 729

(732) 1957 Assam 66.

(733) 1945 Madhya Bharat 103

(734) 1952 Punj 39.

(735) (1958) 2 W.L.R. 110

(736) 1953 Punj. 68.

(737) 1955 Pat. 519.

(738) 1958 N.L.J. (Notes) 56.

*Francis v. Roma Jyotirmay*⁷³⁹ and by the husband infecting the wife with gonorrhoea *Premas Nagla v. Meryn*⁷⁴⁰ and venereal disease *Edna Hardiss v. Harold Hardiss*.⁷⁴¹

Every case must be judged having regard to the possibility and probability of the truth of the allegation with reference to the social conditions and the manner in which the parties are accustomed to live. In judging the evidence it should not be forgotten that the quality of the evidence and not the quantity has to be considered having regard to the usual reluctance on the part of the neighbours to come forward to give evidence in such cases: *Deyani Kanthilal v. Kanthilal*.⁷⁴²

Mere opportunities for committing adultery would not be sufficient proof unless the opportunities and the association were such that it might reasonably be assumed that adultery must have been committed. The falsity of the wife's defence is not proof of the adultery charged against her but post-suit adultery may be adduced as evidence to probabilise the charge of adultery on which the petition is founded.

16. Nullity of marriage.—A marriage is declared null and void under Section 11 of the Act which has been contracted when a former spouse is living or between persons within the prohibited degrees or the sapinda relationship. A petition under this section for a declaration of the nullity of marriage can be filed only by a party to the marriage and not by somebody else. Even in the case of a bigamous marriage the only person who can file the petition is the other spouse of the bigamous marriage and not the other spouse of the first marriage *Amarial v. Viju Bai*.⁷⁴³ Before a marriage can be declared null and void on the ground of a former spouse living, it must be proved that that spouse was a spouse of a valid marriage and not a mere concubine or one whom the husband could not have married by reason of her being within the prohibited degrees or otherwise, on the law as it stood at the time of the first marriage. If the nullity is sought on the ground that the spouses are within the degrees of prohibited relationship, and the defence is that there is a custom or usage governing, each of them which permitted such a marriage, the burden of proving the custom or usage is upon the respondent and if it is not discharged and it is proved that the marriage is within the prohibited degrees under this Act having been contracted after this Act came into force the petition will be decreed. Similar is the position in the case of a marriage within the sapinda relationship, where also it is open to the respondent to prove a custom or usage governing the parties which permits of a marriage within the sapinda relationship. It should be remembered that both clause (4) and (5) of Section 5 which prohibit marriage within the prohibited degrees and sapinda relationship except cases of marriage approved by custom or usage obtaining amongst the communities of both the parties. It is not sufficient to show that there is a custom allowing a marriage within the prohibited degrees or within the sapinda relationship in the community of the petitioner or of the respondent. The custom or usage must be common to both and must exist in both the communities.

17. Voidable marriages.—Section 12 which deals with voidable marriages, and their avoidance by a decree of nullity mentions four grounds for avoidance viz., non-consummation of

(739) I.L.R. (1957) Punj. 181.

(740) 1939 Lah. 507.

(741) 1933 All. 56.

(742) 1963 Bom. 98; I.L.R. (1962) Bom. 706.

(743) 1959 M.F.L.J. (Notes) 60.

the marriage due to impotency of the respondent, unsoundness of mind or mental disorder, or insanity or epilepsy, marriage having been performed without the consent of the petitioner, or when it is with a minor, without the consent of her guardian for marriage or by obtaining such consent by force or fraud, and the pregnancy of the respondent at the time of the marriage by some person other than the petitioner. Coming to the case of the respondent's impotency, the evidence must establish that the respondent is impotent and the marriage was not consummated because of that. The impotency may exist both in the husband and the wife, and does not mean merely sterility or barrenness or incapacity to procreate children. This is eminently a fit case for calling in medical evidence because a particular spouse may be impotent to the other spouse but may not be generally so. A doctor's evidence is generally desirable and necessary for coming to the proper conclusion. There is no invariable rule that the evidence of the aggrieved spouse is inadmissible *Rangaswami v. Aravindammal*,⁷⁴⁴ but it is always safe to require corroboration of the evidence which in the circumstances will be difficult to obtain except by the evidence of the doctor examining the respective spouse. The burden of proof is upon the petitioner *Sano v. Sano*⁷⁴⁵ *Dawson v. Dawson*.⁷⁴⁶ In the case of impotency arising from malformation, the petitioner must further prove that it is incurable, and such evidence must necessarily be medical evidence *T. v. M.*⁷⁴⁷ The Court is entitled to draw but is not bound to draw adverse conclusion or inference from the refusal of a party to submit to medical examination *Bhendra Kumar Biswas v. Hemlata Biswas*.⁷⁴⁸ But as a general rule Court does not grant a decree of nullity on the unsupported oath of the party seeking to be relieved from its obligation. The confession and admissions of parties outside the Court either to the relations or friends which throw light upon the charge of impotency may be admissible, but they are not always sufficient without corroboration. Medical evidence may also throw light upon the more complicated question whether the respondent is impotent only to the petitioner or generally to everybody because cases are not wanting where a particular person is found to be perfectly potent to everybody excepting the spouse. Even in such a case a decree of nullity may be granted on the ground of impotency, *H. v. H.*⁷⁴⁹ In order to succeed in the petition, the petitioner has to show not only that the marriage has not been consummated, but if that non-consummation is due to any impediment such as disease or malformation or any other cause that impediment is incurable *D. v. D.*⁷⁵⁰ But if the male organ is so abnormally big as to render sexual intercourse with the wife impossible, with the result that there has been no consummation of the marriage, the impotency must be held to have been established and a decree on that ground should be granted *Kanaki Balasundaram v. Harry*.⁷⁵¹ In *Civil India Consalpes v. Eswarayya*,⁷⁵² it was

(744) 1957 M. 293.

(745) L.R. 2 H.L. (S.C.) 300.

(746) 29 M.L.J. 185.

(747) L.R. 1 Prob. 31. See *Shaw v. Shaw*, (1962) 1 W.L.R. 25 [it is for the party against whom the incapacity has been alleged to establish that there was a high degree of probability of cure.] See, however *M. v. M.*, (1956) 3 All E.R. 769.

(748) 24 C.W.N. 914. Cf., however *Matharam Augustine v. Vijayarani* (197) 2 M.L.J. 301 (F.B.).

(749) 1928 Bom. 279.

(750) (1954) 2 All E.R. 598.

(751) 1954 Mad. 316; I.L.R. (1954) Mad. 15; (1953) 2 M.L.J. 689; 66 L.W. 1029.

(752) 1953 Mad. 856; (1953) 1 M.L.J. 591.

held that a decree of nullity on the ground of impotency ought not to issue if it is proved even on the day of the final hearing that the respondent alleged to be impotent has become potent either by God's grace or by natural causes or by medical or dietetic treatment. But where it is not proved that the respondent who was impotent at the time of the marriage has been made potent and able to have sexual intercourse even on the day the petition came on for final hearing and disposal, a decree of nullity can be granted.

18. *Unsoundness of mind etc.*—In the case of a petition for a decree of nullity on the ground that the respondent was incapable of giving consent due to unsoundness of mind etc., or though the respondent was capable of according valid consent the respondent was suffering from mental disorder of such degree and to such extent as to render unfit for marriage and the procreation of children or the respondent has been subject to recurrent attacks of insanity or epilepsy the burden of proving the disability is upon the person who sets it up. *Durham v. Durham*⁷⁵³. In *G. v. M.*⁷⁵⁴, it was pointed out that where the party has with the knowledge of facts and of the law approbated a marriage with a lunatic and has taken advantage and derived benefit from the matrimonial relation, it would be unfair and inequitable to permit that party to plead the marriage was a nullity. In order not to nullify a marriage as not having been validly entered into by reason of one of the parties having been incapable at the time of understanding the obligations of the marriage, a mere comprehension of the words or the promises of the marriage ceremony exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language; but may yet be affected by such delusions or other symptoms of insanity as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into. *Durham v. Durham*,⁷⁵⁵ *Hawcock v. Penty*.⁷⁵⁶

19. *Consent obtained by force or fraud.*—For a case to come under Section 12 (1) (a) consent should have been obtained by force or fraud before the marriage was solemnised. The force employed should be such as would have left no choice to the petitioner or her guardian except to consent to the alliance. The nature of the force exerted and the extent of it which would invalidate the marriage on the ground that the consent to the marriage was obtained by such force must vary with the circumstances of the case. Threats of death or bodily harm would be sufficient to invalidate the consent. It is not necessary that the threat should have been made by the party to the marriage. It would be sufficient if it is made with his knowledge and consent by another interested in the alliance. Even threat of exposure to the detriment of the reputation or to a criminal prosecution would also be sufficient in the circumstances of any particular case if the party threatened was of such weak mind that he had succumbed to the threat and agreed to the marriage. *Scott v. Sebright*.⁷⁵⁷ As regards fraud vitiating consent to the marriage particulars must be furnished in the substantive petition: mere allegation of fraud or fraudulent act of concealment is ineffective.⁷⁵⁸ It must be fraud which induced the consent and does not include every false or incorrect misrepresentation made before the marriage by either party to the marriage for the purpose of bringing

(753) 10 F.D. 80.

(754) 10 A.C. 171 at 186. See *Bani Devi v. A.K. Banerjee*, 1972 Delhi 50.

(755) 10 F.D. 80.

(756) L.R. 1 Prob. 341.

(757) 12 F.D. 24.

(758) *Ravik Chandra v. Manjivani*, 1973 Cal. 545.

about the marriage. But if the fraudulent misrepresentation has been made in respect of any matter which would operate as a ground of judicial separation or divorce or nullity of marriage, as for instance a representation that the girl to be married is perfectly hale and healthy when in fact she is suffering from syphilis or other malignant disease not apparent but discoverable on minute and close examination, or it is represented that she has been a girl of unimpeachable virtue when in fact she is pregnant by intercourse with another, the pregnancy not noticeable on account of its being in the early months, the consent is vitiated and the marriage resulting from such consent can be avoided. The nature of the fraud which would vitiate the consent must necessarily be decided with reference to the nature of the representation or suppression of information with regard to the eligibility of the party for the marriage in the normal sense of the term. Mere representation regarding the status or reputation or salary or means or connections or health which though false cannot be said to relate to the fundamentals of marital competency cannot be held to be fraudulent within the meaning of fraud which would vitiate the consent to the marriage.

If a person never intended to go through the form of marriage which the person was made to go through like an automation he or she could not be considered to have gone through the marriage at all and the marriage would be invalid.⁷⁵⁹

20 Pro-marital pregnancy.—It is for the petitioner-husband who seeks annulment of the marriage on the ground of pre-marital pregnancy of the wife to establish that all the requirements of Section 12 (1) (d) and Section 12 (2) (b) are satisfied.⁷⁶⁰ For avoidance of marriage based upon the pregnancy of the wife at the time of the marriage, it is necessary that the husband should be unaware of it at the time of the marriage, whether the pregnancy is due to him or to somebody else. If the pregnancy is sufficiently advanced so that anybody who has an eye can discover it, it does not lie in the mouth of the husband to state that he was not aware of it at the time of the marriage. It is for the petitioner to show that the respondent was pregnant by some one else at the time of marriage.⁷⁶¹

21. Conversion to some other religion—The proof of conversion lies in the fact that the convert has already undergone some ceremony of conversion which is observed in the religious community to which the alleged convert has transferred his religious loyalty. Mere profession of preference and even regular attendance at the religious ceremonies of the community belonging to another religion will not be sufficient nor mere expression of admiration for the tenets and practices of another religion would establish conversion. Very often the sense of the new community into which the alleged convert is reported to be drafted has also to be ascertained to find out whether that community which practices another religion regards him or her as belonging to the new religion. The right to get a divorce on the ground of change of religion is given to the party who continues to be a Hindu.

22. Renunciation of the world by entering a religious order.—Mere declaration by a person that he has given up the world does not make him a *sannyasi* so as to furnish a ground for divorce. The renunciation must be accompanied by the customary ceremonies obtaining in the religious order into which he has been drawn. Mere wearing the yellow

(759) *Ankanna v. Bismappa*, 1937 Mad 332; *Anth Nath De v. Lejjabai Dori*, 1959 Cal. 778.

(760) *Sivaguru v. Saraju*, 1960 Mad. 216, *Savitram v. Yashodabas*, 1962 Bom. 190.

(761) *Mahendra v. Sushila*, 1965 S.C. 364; *Nadai Kumar v. Anjali Bismar*, 71 Cal. W.N. 651; 1968 Cal. 105.

robe which is usually the symbol of renunciation is not always a certain and sure test, for it may well be a cloak of fraud to deceive the world by eliciting sympathy and respect. Orthodoxy *sanyasa* implies relinquishment of all property and an actual abandonment of all worldly concerns including even a desire for them. No relinquishment in favour of any particular person is necessary, but one about to become a *sanyasi* may simply abandon or discard all his property.⁷⁶²

23. Discretion to refuse decree.—The words at the end of Section 23 (1) namely “shall decree the relief” appear to postulate that the Court has no discretion in the matter of awarding or refusing a decree when the charge in the petition is made out by cogent and clinching evidence. But it is difficult to say that the long and uniform practice of the English Courts in respect of such matters was intended to be departed from by the use of the above words. The duty enjoined on the Court to bring about a reconciliation between the parties under sub-Section (2) and the use of the word “may” in the substantive Sections 11, 12 and 13 and the numerous precautions with which the decree section, namely, this section is hedged in may be urged as giving a fairly clear indication that the discretionary power of the English Courts in respect of such matters is not intended to be abrogated. If this contention be correct (as it does not appear to be on account of the categorical language of the section), this discretion should be exercised not capriciously but carefully and cautiously and as far as possible consistently not only in regard to the parties themselves but also with reference to the interests of the public morality and decent society. Where the trial judge after hearing the parties and their witnesses refused to grant a decree for dissolution of marriage to the petitioner on the ground that the petitioner is guilty of adultery, the appellate Court will be slow to interfere with this exercise of discretion by the trial judge. *Lilly v. Dennis*,⁷⁶³ *Burket v. Hakim*.⁷⁶⁴

24. Interim alimony.—Section 24 provides for the grant of alimony or allowance for the support of either spouse during the pendency of a matrimonial proceeding when the particular spouse applying for such allowance is without means and is unable to support himself or herself. The object of the provision is to enable the husband or the wife as the case may be who has not the means to be provided with funds by the other spouse who has the means so that the spouse may be in a position to maintain himself or herself and conduct the proceeding. *Annapurnamma v. Ramakrishna*.⁷⁶⁵ This case also holds that this power to award interim maintenance is exercisable by the appellate Court also. It is a point to be noted and it is a fundamental point that this provision for alimony can be made not only for the wife but also for the husband in proper cases, and further that this interim alimony or interim allowance is payable not only to the petitioner but also to the respondent: *Kamala v. Sharma*,⁷⁶⁶ *Nanjappa v. Vimala*.⁷⁶⁷ Thus if a wife comes to Court seeking divorce against the husband on the ground of adultery and if the husband is a man of means and the wife has not the wherewithal to prosecute the petition, the Court is entitled to direct the husband during the pendency of the divorce petition to pay her sufficiently to maintain herself. So also if in a particular case the wife is well-to-do

(762) *Kandol Rao v. Imvora Sengani*, 33 M.L.J. 63.

(763) 1982 Rang. 172.

(764) 1981 Lab. 1.

(765) (1966) 2 Andh. W.R. 382.

(766) 1958 B. 66.

(767) 1987 Mys. 44.

but the husband has not the means to defend the petition for he may well have a proper defence, then it is equally open to the Court to direct the wife to make the *interim* allowance to the husband. As already said *interim alimony* is not a thing that is payable only to the petitioner or the respondent. It may be made payable to either party with this qualification that the party to whom alimony is paid should be without means and the party who is directed to pay the alimony should be well-to-do. If neither of them has got the means, then no order should be passed, because no party can be said to be in a better position financially than the other. So also if both of them have got the means to prosecute or defend the petition, an order for alimony is not proper. Where there is an order for the payment against a party, the petition should, if necessary, be adjourned till the amount is paid *Takub v. Christina*.¹⁴⁸ As in the case of maintenance allowance, so also in the case of costs, there is no distinction between the petitioner and the respondent, and either of them may be made to pay the costs of the other as a matter of interim relief, depending upon the means of the one and the exigence of the other.

25. Quantum of alimony—What would be the proper alimony or allowance to be paid in any particular case must depend necessarily on the means of the party ordered to pay and the means of the party to whom it is made payable. Under the Divorce Act there is a provision that the husband may be made to pay interim alimony during the divorce proceeding to the wife to the extent of one-fifth of his net income. But section 24 of the Hindu Marriage Act does not prescribe any such ratio or proportion. In England the practice was to compel the husband to pay one-fourth of his income to the wife pending the matrimonial proceeding. It appears that the provision in this Act which leaves to the Court a discretion in the matter is probably the best because in all these matters a hard and fast rule does not always conduce to proper justice. In the application for interim alimony which is to be made to the party in need of it, the circumstances of the petitioner which have compelled him or her to file the petition for interim alimony and the circumstances of the respondent against whom the petition is filed have to be set out making a case for granting an order as desired by the petitioner. No elaborate evidence has to be taken on the question as to what would be the proper amount that has to be ordered by the Court, since having regard to all the circumstances it must be left to the Court's discretion which of course will have to be judiciously exercised in the interests of justice on *prima facie* grounds so that no hardship may be caused to the other party. In this view it is unnecessary to go elaborately into the sensibility or otherwise of certain rules of thumb which are being followed both under the Divorce Act and by the English Courts in such matters. Fundamental differences have been made in the section and one fundamental difference as we have already seen is the power of the Court to order even a wife to pay interim alimony to the husband which in particular circumstances may operate as a very laudable provision indeed.

26. Interim alimony to be ordered on a petition—The interim order for alimony and the costs of the proceedings can be made only on a petition presented by the needy party. This petition should not suffer from undue delay in its presentation and must contain cogent grounds why the prayer should be granted and to what extent the alimony can be ordered. Generally the interim alimony has to come from the net income of the other party. But in fixing the rate the income of the party petitioning for interim alimony should also be taken into consideration. The rule is sometimes adopted that the income of the petitioner as

well as that of the respondent in the petition for interim alimony should be added up and the petitioner will be paid one-third of the difference between the income of the petitioning spouse and the total of both the incomes. But this is only a rough and ready method which may well work satisfactorily in the lower income group. Supposing the husband is getting Rs. 15,000 a month and the wife files a petition for divorce, and it is found that the wife has no means, in such a case the calculation according to the above rule will yield the result that the husband will have to pay the wife Rs. 5,000 every month by way of interim alimony and expenses of litigation. This certainly cannot be proper. In Hindu Law prior to the Act, in the case of middle class groups, a rough kind of rule was sometimes applied by the decisions, namely, that the husband should pay the wife maintenance at the rate of one-fourth of his net income. Normally this rule can well be adopted in the matter of ordering interim alimony to the wife in divorce actions also amongst the middle class people.

In *Mukan Kunwar v. Ajitchand*,⁷⁶⁹ it was held that though the award of maintenance *pendente lite* and the expenses of the proceeding is undoubtedly in the discretion of Court, it should be exercised judicially and on sound legal principles and not by caprice or humour. See also *Mahalingam Pillai v. Amavalli*,⁷⁷⁰ and if the discretion is exercised perversely, the party prejudiced is entitled to have it interfered with by the High Court. The usual rule is that in the absence of a good cause shown a petitioner for interim relief who is not shown to have been in possession of independent means is entitled to the maintenance *pendente lite* and the expenses of the litigation. The fact that the applicant is being supported by an adulterer and that the respondent is not possessed of sufficient means may properly constitute good cause for the deprivation of the interim relief. The fact that the father is supporting the wife who is the applicant for the interim relief or that she had not claimed the maintenance before would be no ground for depriving her of such relief. *Mukan Kunwar v. Ajitchand*.⁷⁷¹ In estimating the independent means of the wife who is generally regarded as a privileged suitor in divorce cases, the income of the wife's parents or other relations ought not to be considered. *Mahalingam Pillai v. Amavalli*.⁷⁷²

[25-A. Relief for respondent in divorce and other proceedings.—In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may, not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the Court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented any petition seeking such relief on that ground.]

NOTES

This section empowers the Court in any proceeding for divorce, or judicial separation or restitution of conjugal rights to give relief to the respondent opposing the proceeding on the ground of the petitioner's adultery, cruelty or desertion and making a counter-claim on any of these grounds. The Court will grant relief to the respondent to which he would have been entitled had he filed the petition on any of these grounds.

(769) 1956 R.J. 322.

(770) (1996) 2 M.L.J. 289.

(771) See footnote (769).

(772) See footnote (770).

^aInserted by Act LXVIII of 1976, S. 17.

24. Maintenance *pendente lite* and expenses of proceedings.—Where in any proceeding under this Act it appears to the Court that either the wife or the husband as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable.

Section 24- Synopsis.

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| 1. Scope of the section. | 4 A. Court's approach. |
| 2. Even a husband can apply for interim maintenance. | 5 Quantum of maintenance |
| 3. Independent income | 6 Time for application for interim main. |
| 4. Application necessary for interim main | 7. Expenses of proceedings |

1. Scope of the section—An order under section 24 can be made only in any proceeding under the Hindu Marriage Act.⁷⁷³ whether it is a petition for restitution of conjugal rights, or judicial separation or nullity of marriage or divorce. But where in a petition for restitution of conjugal rights the wife denied the very factum of marriage and her status as the wife of the petitioner-husband, she can only claim litigation expenses and not maintenance.⁷⁷⁴ She cannot blow hot and cold in the same breath denying that she was the wife for purpose of Section 9 and claiming as wife under Section 24. A wife is not precluded from claiming maintenance under section 24 notwithstanding that she had preferred a suit for regular maintenance under section 18 of the Hindu Adoptions and Maintenance Act.⁷⁷⁵ The right to relief under Section 24 of the Hindu Marriage Act is not dependent either on the merits of the main petition or on the decision of any particular issue or upon the ultimate success or failure of the main petition.⁷⁷⁶ The *raison d'être* is that when the marriage is admitted it is the duty of the affluent spouse to maintain the indigent spouse. The exercise of power under section 24 is not dependent on the defence raised on behalf of the opposite party.⁷⁷⁷

The enquiry contemplated under the section is summary in nature and the Court has to decide on *prima facie* materials without embarking upon a very elaborate and exhaustive investigation.⁷⁷⁸ The object behind the section is to provide financial assistance to the indigent spouse to maintain herself (or himself) during the pendency of the proceedings and also to have sufficient funds to carry on the litigation so that the spouse does not unduly suffer in the conduct of the case for want of funds.⁷⁷⁹

(773) *Dave v. Sohan Lal*, 78 Punj. L.R. 226.

(774) *Ravi Kumar v. Nirmal Devi*, (1978) 80 Punj L.R. 561.

(775) *Sinhachalam v. Papamma*, (1972) 1 An. L.T., 242; 1973 A.R. 31.

(776) *Suresh Kumar v. Kamlesh*, 1974 Ail. 110, *Sarirakha Devi v. Murlidhar Subudhi*, 1973 (2) C.W.R. 1904.

(777) *Arin v. Kumar Pal*, 1977 Delhi 76.

(778) *Sarirakha Devi v. Murlidhar Subudhi*, *supra*.

(779) *Chitra Lekha v. Ranjit Rai*, 1977 Delhi 176; *Suzelamma v. Raghunatha Reddy*, (1977) 2 An. W.R. 98; *Arin v. Kumar Pal*, *supra*.

The expression "during the proceedings" in section 24 would cover the proceedings from the start till the end or at least from the date the application is made till the termination of the proceedings in the Court.⁷⁸⁰ No interim alimony and litigation expenses can be granted after termination of the proceedings.⁷⁸¹

A pre-existing order under the Criminal Procedure Code for payment of maintenance does not oust the jurisdiction of the Court to allow maintenance.⁷⁸² An application under Section 476, Criminal Procedure Code of 1898 is not a proceeding under the Hindu Marriage Act and Section 24 cannot apply.⁷⁸³ Before interim maintenance is ordered the Court should be satisfied that the petitioner for such interim maintenance has no independent income sufficient for his or her support and the necessary expenses of the proceeding. It is to be observed that the petitioner for the interim relief need not be the petitioner in the main petition and may be the respondent in the main petition *Rajkumari v. Trilok*,⁷⁸⁴ *Gopendranath Basu v. Smt. Prabha Rani*.⁷⁸⁵ Two things must be established before the petition can be ordered namely, absence of independent income and inefficiency of the income for the purposes mentioned. The fact that out of sympathy for the petitioner's lot some relation or friend of the petitioner is paying the maintenance would not make it independent income. The independent income here means his or her own income from his or her own property or by his or her occupation or service at the time. Besides, if he or she gets some income, he or she must further show that such income as he or she is getting is not sufficient for his or her maintenance and the expenses of conducting the petition. The only consideration that should enter the judicial mind in an application under this section is whether the applicant is possessed of sufficient means or not for the support of the applicant and the necessary expenses of the proceeding *Saraswathi v. Krishnamurthy*.⁷⁸⁶

An order under this section is appealable under section 28 of the Act. *Sophana Sena v. Amaranta*.⁷⁸⁷ No revision will however lie.⁷⁸⁸

Maintenance can be ordered from the date of service of the notice in a proceeding started by the husband for divorce.⁷⁸⁹

The words "during the proceeding" in section 24 mean a proceeding arising out of the Act and pending in the Court. An appeal pending in the appellate Court is a proceeding

(780) *Sarkis v. Captain Arvind Kumar Mehta*, (1978) 80 Punj. L.R. 213; *Kamla Rani v. Raj Kumar*, 1971 Cur. L.J. 512; 73 Punj. L.R. 912 [interim maintenance to be fixed from the date of commencement of such proceedings] Cf. *Nirmala Devi v. Ram Dass*, 1973 Punj. 48.

(781) *Chitra Lakha v. Ramjit Rai*, 1977 Del. 176.

(782) *Satish v. Surjit Singh*, 1977 P. & H. 383.

(783) *Daga v. Sahmalal*, 78 Punj. L.R. 226.

(784) 1959 All. 628.

(785) 66 C.W.N. 388.

(786) 1960 Airdh. Fra. 30.

(787) 1969 Cal. 453. See also *Parasram Rao v. Prabha*, (1974) 1 Karn. L.J. 263; *Madhabar v. Malva*, 1 L.R. (1973) Bom. 1003; 1973 Bom. 141; *Nirmala Devi v. Ram Dass*, 1973 Punj. 48; *Sarkis Devi v. I* 1968 All. 601; *Kuntala Rao v. Keshavanatha*, 1967 A.P. 323 (F.R.); *Jai-at v. Jai-at*, 1967 Punj. 146; *Jagdish*, 1964 Oriam 122; *Sophana v. Amara Kanta*, 1959 Cal. 453; *Rukmanthai v. Kishmalal*, 1959 M.P. 181.

(788) *Suresh Prasad v. Manorama Devi*, 1973 Pat. 321.

(789) 1958 Cal. 453.

under the Act and maintenance allowance can therefore be granted from the date of the filing of the appeal and not from the date of the filing of the application for maintenance⁷⁹⁰.

If relief under section 24 can be granted in an appeal from a decree or order passed under the Act, it can also be granted in a revision under Section 115, Civil Procedure Code against an order passed in a proceeding under the Act.⁷⁹¹

It has been held,⁷⁹² but not without dissent⁷⁹³ that the words 'wife or husband' should not be interpreted in a strict and literal sense as to rule out maintenance for the benefit of dependent children living with the wife. By the very nature of the circumstances the requirement of the wife will include the requirement of minor children living with her and depending on her.

Though the word used in Section 24 is "may" it would be only in extraordinary circumstances that a Court would refuse to grant an application under that provision, if the conditions precedent for the grant of such allowance are fully satisfied⁷⁹⁴. The conduct of either party is immaterial and irrelevant in regard to awarding maintenance *pendente lite*⁷⁹⁵

Though there are no words specifically stating that an application under section 24 has to be disposed of prior to the main petition, it is clear that the application under the section is intended to be disposed of in the first instance during the pendency of the main petition. It is not open to the Court to tack on the application to the main petition itself⁷⁹⁶. When the trial Court postpones orders on the application until the final issue is decided, the High Court as the Court of appeal can award maintenance and litigation expenses.⁷⁹⁷ Section 24 vests a wide discretion in the Court enabling it to modify, vary or suspend an order of maintenance on account of change in circumstances⁷⁹⁸. Section 24 does not in terms provide for discontinuance of the monthly allowance granted under the section but the Court which is seized of the matter has always the power to so act as to do justice between the parties and

(790) *Mukharji Premji v. Pankajmal*, 1970 All L.J. 1406; see also *Mukun Kumar v. Ajit Chand*, 1961 Raj. 51; *Annapurnaamma v. Ramakrishna*, (1958) 2 An. W.R. 382.

(791) *Surindra Kumar v. Kanglesh*, 1974 All 110.

(792) *Damodar v. Bindu*, (1974) 76 Punj. L.R. (D.) 33; *Bibi Balbir Kaur v. Raghubir Singh*, 1974 Punj. 225 [in fixing quantum, necessities of minor children can be taken into account]; *Apna Rao v. Parvatasamma*, (1974) 2 An. W.R. 359; (1974) 2 A.P.L.J. 159 [relief to children can be granted under S. 26].

(793) *Chandrasekar v. Sharadabai*, (1977) 2 Kara. L.J. 29 [award of maintenance to son is without jurisdiction]; *Chitna Babu v. Parbati*, 1967 Orissa 163 [daughter cannot claim benefit].

(794) *Usha v. Sadhir Kumar*, (1974) 76 Punj. L.R. 195.

(795) *Lallabhai v. Nirmalaben*, I.L.R. (1971) Guj. 1183-1972 Guj. 174.

(796) *Mythiah Ramani v. Capt. K.T. Ramani*, (1976) 1 M.L.J. 893; 69 L.W. 264; 1976 Mad. 260; *Arvi v. Kumar Pal*, 1977 Delhi 76 [postponement of application till validity of marriage is decided is illegal]; *Chikagondal v. Sukku Devi*, 1975 Raj. 8.

(797) *Arvi v. Kumar Pal*, *supra*.

(798) *Anuradha v. Sanjeev*, (1976) Delhi 245; *Doshi v. Parvathiam*, 1973 Raj. 2.

very its earliest order in, the light of the charged circumstances of a given case.⁷⁹⁹ The suspension of an order of maintenance *pendente lite* on the indigent wife not producing any evidence only means that the order is put in inactivity and on the cessation of suspension it will revive with its full vigour without any further orders. The object of the suspension was to prompt the wife to lead her evidence expeditiously and for that purpose a penalty was imposed which consisted of deferring of punctual payment of the monthly allowance of maintenance which itself entails severe hardship.⁸⁰⁰

An order fixing maintenance and litigation expenses without stating either the facts or the grounds on which it was passed is not proper or legal.⁸⁰¹ Where the order is not supported by any reason and does not discuss the *pros* and *cons* of the rival versions of the parties relating to the quantum of the husband's income it is liable to be set aside.⁸⁰²

In proceedings under Section 24, no maintenance as such would be awarded for a period subsequent to the disposal of the petition.⁸⁰³ An order made under Section 468 (now Section 125) of the Criminal Procedure Code cannot be cancelled merely because interim maintenance has been granted under Section 24, Hindu Marriage Act. That must necessarily await the final disposal of the main petition for matrimonial relief.⁸⁰⁴

The terms "respondent" and "petitioner" in the section refer respectively to the respondent and petitioner in the interlocutory application and not to the respondent or petitioner to the main or substantive application.⁸⁰⁵ An application under the section can be made by a spouse who may be either the petitioner or the respondent to the main petition for any of the matrimonial reliefs.⁸⁰⁶ An order staying further proceedings in the substantive petition for matrimonial relief will not affect the operation of an order passed under Section 24.⁸⁰⁷ Nor will the withdrawal of the substantive petition absolve the husband of his liability to the wife to pay her the interim maintenance that had been ordered under Section 24 and due to her till the date of such withdrawal.⁸⁰⁸ Arrears from the date of the main petition can be ordered though the application under Section 24 was made only later.⁸⁰⁹

The making of an order under Section 24 is one of discretion with the Court, a discretion which is judicial and has to be exercised on sound principles of matrimonial law.⁸¹⁰ In exercising its discretion it would be open to the Court to award interim maintenance from the date of demand for the same, by serving a notice on the other side after institution of the

(799) *Kamla Rani v. Raj Kumar*, 73 Punj. L.R. 912.

(800) *Anuradha v. Santosh*, 1976 D.L.J. 246.

(801) *Sakuntala v. Amar Nath*, 1978 P. & H. 32.

(802) *Satish v. Surjit Singh*, (1977) 79 Punj. 384. 1977 P. & H. 383.

(803) *Soverajyavanti v. Mummala*, (1971) 2 An. W.R. 351.

(804) *Ibid.*

(805) *Rakmanj Bai v. Kishan Lal*, 1959 M.P. 107; *Rajkumar v. Trijok Singh*, 1959 All. 628.

(806) *Krishnan v. Thailambal*, (1969) 1 M.L.J. 528.

(807) *Balasubramanian v. Saroja*, 68 Punj. L.R. 121.

(808) *Ibid.* See also *Krishnan v. Thailambal* supra.

(809) *Sabir v. Sujata*, 70 Cal. W.N. 633.

(810) *Mahend Kumar v. Ajit Chand*, 1961 Raj. 51; *Mahalingam v. Ammalak*, (1956) 2 M.L.J. 289.

proceeding and not from the date of the application.⁸¹¹ According to English decisions, alimony *pendente lite* may be granted by the Court in the exercise of its discretion even where in the pending petition the jurisdiction of the Court is questioned,⁸¹² or the very validity of the marriage is challenged.⁸¹³ Section 24 places the husband and wife on the same footing and makes it possible to grant the relief against the wife also.⁸¹⁴

In case of non-compliance with an order directing payment of maintenance *pendente lite* and expenses of the proceedings, the Court has got the power to stay the matrimonial action for the purpose of carrying out the order: *Rameshwar Prasad v. Dropta Bai*.⁸¹⁵ There is nothing in the scheme of the Act prohibiting such stay.⁸¹⁶ If the wife has obtained a decree for restitution of conjugal rights and the husband has appealed, the wife can execute the decree and if the husband stays stay pending appeal, he may be asked to pay up all the amounts due and the Court can avail of the provisions of Order 41, rules 5 and 6 of the Civil Procedure Code.⁸¹⁷ It would be in the interest of justice to dismiss the appeal itself for non-compliance with the order.⁸¹⁸ The main sanction behind an order for payment of interim maintenance and litigation expenses is that in case of non-compliance, the defaulting party can be debarred from prosecuting or defending the proceedings.⁸¹⁹ The Gujarat High Court is of the view that the Court cannot dismiss a proceeding⁸²⁰ or order the defence to be struck off.⁸²¹

2. Even a husband can apply for interim maintenance.—Though interim maintenance during the pendency of a matrimonial cause is usually made payable by the husband to the wife, this section enables the husband also to apply for the interim relief, in appropriate cases. The word 'respondent' in the section means the respondent to the application for maintenance and refers to the opposite party in that application. *Rukmani Bai v. Kishanlal*⁸²², *Rajkumari v. Trilok Singh*.⁸²³ A poor man might have married a rich wife and the wife may file a petition for any of the reliefs provided by the Act, namely, restitution of conjugal rights, judicial separation, nullity decree or divorce. The husband not being a man of means may not be possessed of sufficient funds to meet his maintenance and the cost of conducting the defence which

(811) *Sobhana v. Amara Kanta* 1959 Cal. 516; *Pratima v. Kamal Kumar*, (1964 68 Cal. W.N. 316.

(812) *Johnstone v. Johnstone*, (1929) P. 145; *Smith v. Smith* (1923) P. 126.

(813) *Foden v. Foden*, (1894) P. 307; *Blackmore v. Mills*, (1868) 18 L.T. 586. Cf., however, *Razi Kunn v. Nirmal Devi* 1978, 80 Punj. L.R. 561.

(814) *Nanjappa v. Vimala Devi*, 1957 Mys. 44.

(815) (1963) M.P. 257; *Ramachandra Rao v. Kausabya*, 1969 Mys. 76. Cf. *Yakub v. Krishna*, 1941 All. 93.

(816) *Madhuban v. Mahendra*, (1976) 17 G.L.R. 422.

(817) *Ibid*.

(818) *Ram Suresh v. Jonak*, 1973 Punj. 40.

(819) *Nirmala Devi v. Ram Dass*, 1973 Punj. 48.

(820) *Manilal v. Jyotsmatiben*, (1964) 5 Guj. L.R. 407.

(821) *Prakashbhai v. Ashabai*, (1964 5 Guj. L.R. 417. Cf., *Polakshingshi v. Shivasubha Kumari*, 1960 Bom. 515. Cf., however, *Mshahangam v. Amagalli*, (1956) 2 M.L.J. 256.

(822) 1959 M.P. 187.

(823) 1959 All. 628.

he may have thereto. In such circumstances, it is open to the Court on a petition by the husband setting out the circumstances justifying an order for interim relief to him to direct the wife to pay maintenance and the cost of the defence of the husband. The amount of the cost and the maintenance must depend necessarily upon the means of the parties, the nature of the case and the defence and the incidental expenses that have to be incurred for the efficient conduct of the proceeding. The husband may be entitled to apply for this interim relief when he happens to be the petitioner in the main petition. If in the above case the wife leaves the husband and is living in adultery with another and the husband has to file a petition for dissolution of the marriage by a decree of divorce and he applies for the interim maintenance and the cost of litigation, he can be granted the relief under this section if he satisfies the Court that he has no independent means sufficient for his support and the necessary expenses of the proceeding. It is *a fortiori* when the petitioner for interim relief is the wife, be she the petitioner or be she the respondent in the main petition based on the matrimonial offence.

3. Independent Income.—The expression “independent income” has not the meaning of regular receipt of money periodically from a given source as the expression “income” is used in the Income-tax Act. It merely means the wherewithal or funds or assets from which the maintenance and the costs can be met. Hence the use of the expression income is unfortunate and the expression “means” may well have been used instead of the word “income.” It surely could not have been the intention of the legislature that a party who has large assets by way of landed property or palatial house or a big hoard of money none of which yields any rent or interest but which can easily be converted to meet the expenses of the maintenance and expenses of the proceeding can be permitted to apply for interim maintenance and the costs against the respondent who has no property but is getting some salary which may leave some small margin of surplus after meeting the maintenance and the cost of litigation. Nor does the section mean that if the respondent to the interim maintenance has plenty of property but no income is received by him or her, he or she cannot be ordered to pay the interim maintenance and costs to the other spouse who is without the means to meet those expenses. If both the parties have the means to conduct litigation and meet their expenses of maintenance no order for interim maintenance can be awarded. So also if each of them is without means or income or at any rate possessed only of sufficient means which would leave no margin of surplus after meeting his or her own maintenance and the expenses of the petition, then also no order for this interim relief can be passed⁽⁸²⁴⁾. Independent income means net income after deducting compulsory outgoings like income-tax, provident fund contribution, etc.⁽⁸²⁵⁾ and in considering the means of the wife, possession of ordinary jewellery and household movables like utensils and furniture ought not to be taken into account: *Kavitha v. Kavitha*.⁽⁸²⁶⁾ In *Radika Bai v. Sadhu Ram*,⁽⁸²⁷⁾ it was held that the goodwill or charity of relations and friends cannot be taken into account nor her mere potential capacity to earn something or possession of jewels which she could convert into cash and there would not be a proper ground for refusing her the funds necessary for her carrying on the litigation.

In considering this question of means of the applicant, the circumstance that the applicant is being supported by an adulterer and that the respondent has not sufficient

(824) *Prati v. Rajend*, 1979 All 29.

(825) *Ibid*.

(826) (1956) 1 M.L.J. 355.

(827) 1970 M.P. 14.

would be a proper ground for depriving the applicant of the benefit of this section. If the Court comes to the conclusion that even if she, the applicant has no income but she has the support of her parents or such others, the Court may award a nominal monthly amount towards maintenance.⁸²⁸ But if the Court comes to the conclusion that the applicant is entitled to *pendente lite* maintenance, the quantum may be fixed at one-sixth of the net income of the respondent. *Nandhams v. Ajit Chand*,⁸²⁹

4. **Application necessary for interim maintenance.**—The interim maintenance and the allowance for the expenses of the proceedings cannot be ordered unless there is a petition asking for the same. It may be presented by the husband or the wife, by the petitioner or the respondent in the main petition, and should set out the facts necessary for sustaining it namely the indigence of the petitioner, means and source of income of the petitioner and the respondent, and how in the circumstances it is just and necessary that the petition should be granted for the amount prayed for. Since the order on the petition should also make a provision for the expenses of the proceeding the petition should also contain particulars as to the costs of the proceeding including the stamps payable, the fees necessary for engaging counsel for the efficient conduct of the proceeding and such other expenses incidental to the proceeding such as the expenses of preparing the record, the batta to the witnesses, the necessary conveyance charges in case the petitioner lives in a different place, etc. From the wording of the section it is clear that the expenses of the proceeding has to be paid as a lump sum while the the maintenance amount may have to be paid as a lump sum or in instalments.

4-A. **Court's approach**—In regard to interim maintenance, the Court goes ordinarily by the principle that a marriage *de facto* carries with it the right to interim maintenance in matrimonial proceedings. The only consideration that should enter the judicial mind is whether the applicant is possessed of sufficient means for his or her support and, necessary expenses of the proceeding.⁸³⁰ The Court will generally regard the wife as innocent until she is proved guilty of the charge or counter-charge preferred against her.⁸³¹ In cases where both the parties are practically penniless the power of the wife to maintain herself would specially be considered.⁸³² Section 24 does not stipulate anything about the standard to be maintained by either of the parties; nor does it stipulate that the wife must be maintained at the same standard as the husband and *vice versa*.⁸³³ In a wife's application for interim maintenance the core consideration is whether she is not having any independent income of her own sufficient to support herself.⁸³⁴ Where from the affidavits it is clear that she has neither a job nor other means she will be entitled to interim maintenance and litigation expenses.⁸³⁵ At the same time, it should be clear that the husband has an independent source of income and is

(828) *Preeti v. Rajind*, 1979 All. 29; See also *Radjikhal v. Sadhwan*, 1970 M.P. 14. *Shakami v. Durgarazam*, 1954) 2 M.L.J. 397 [good-will or charity of relations and friends should not be considered].

(829) 1958 Raj. 322.

(830) *Saraswati v. Krishnaswami*, 1960 A.P. 30.

(831) *Mithaligan v. Amralli*, (1956) 2 M.L.J. 219; Cf., *Balkar Kaur v. Raghnath Singh*, 1974 P. & H. 325.

(832) See *Nicholls v. Nicholls*, 30 L.J. P. & H. 254.

(833) *Preeti v. Rajind*, *supra*.

(834) *Bajajal v. Ram Lata*, 1974 Raj. 93.

(835) *Janya Das v. Smt. Sahajan*, I.L.R. (1974) H.P. 466; 1975 H.P. 18.

in a position to make payment⁶³⁶ The fact that the wife had been managing to maintain herself for quite some time prior to the institution of the petition though the husband had not contributed anything will not disentitle her to claim interim maintenance.⁶³⁷ The place of residence of the wife is not relevant for the purpose of deciding her entitlement for interim maintenance. If she is entitled to be paid interim maintenance she can claim such maintenance irrespective of her place of residence.⁶³⁸ The conduct of the spouses may be taken into account in an application under Section 24 as it often indicates the motive of the concerned parties.⁶³⁹ A principle which the Court will have to bear in mind while awarding interim maintenance and expenses is that its order should not work out as a penalty crippling the party from prosecuting the proceedings. A low-paid husband, for instance should not be made to part with a lion's share from his income either towards interim maintenance or towards costs.⁶⁴⁰

Maintenance should normally include a sum which a wife has to spend in order to find a shelter.⁶⁴¹ The wife cannot claim her educational expenses under Section 24.⁶⁴²

5. *Quantum of maintenance.*—The amount payable by the husband to the wife is usually called alimony which signifies literally nourishment or sustenance. This word has not been used in this section because the primary signification of the word is maintenance to the wife and it is not in that sense that the word maintenance is used in this section because this section provides for maintenance for the husband also. The maintenance means provision for food, clothing and habitation and other necessities for the support of the wife or the husband. This section deals with temporary alimony which is synonymous with the terms *alimony pendente lite* or *alimony ad interim*. The question whether the petition should be granted at all and if it should be allowed what is the amount that should be awarded must be in the discretion of the Court though that discretion should not be arbitrarily exercised but should be exercised judicially to serve and subserve the interests of justice. The Act itself has not set any limit to the maintenance awardable under Section 24. The section empowers the Court to award such sum as "it may seem to the Court to be reasonable." What is a reasonable amount must differ from case to case.⁶⁴³ Neither a minimum nor a maximum percentage of the respondent's income can be fixed for the maintenance allowance. The quantum must depend on the circumstances of the case.⁶⁴⁴ No mathematical proportion of the respondent's income is to be awarded.⁶⁴⁵ Following the practice under Section 36 of the Divorce Act, some High

(636) *Lila Devi v. Jorik Shand*, 1978 80 P.L.R. 744. Cf. *Balbir Kaur v. Ragbir Singh*, 1974 Punt. 225 [even if husband has no job at present but he has had offers of jobs which he was not prepared to accept, he cannot leave his wife and children to starve till he comes by a job to his liking].

(637) *George v. George*, (1867) L.R. P.D. 535; *Mohan Kanner v. Ajitchand*, 1958 Raj. 332.

(638) *Lakshmi v. Sunder Alimassian*, 1977 Mad. 409.

(639) *Parthar v. Parthar*, 1957 Raj. 52.

(640) *Papa Gunda v. Subbamma*, (1977) 1 Karn. L.J. 286.

(641) *Usha v. Sudhir Kumar*, (1974) 76 Punt. L.R. 195.

(642) *Sande v. Sajna*, 70 Cal. W.N. 638.

(643) *Prati v. Rajad*, 1979 All. 29.

(644) *Ibid.*

(645) *Usha v. Sudhir Kumar*, *supra*.

Courts have held that ordinarily in the absence of special circumstances one-fifth of the net income of the respondent should be allowed.⁸⁴⁶ This practice is not warranted and the rule has no place in the Hindu Marriage Act, as Section 24 itself expressly states that the interim maintenance should be a "reasonable" amount.⁸⁴⁷ For fixing the quantum it is only the "net" or disposable income "of the respondent that should be taken into account."⁸⁴⁸ In the determination of the amount which would be just and proper such circumstances as the ability of the parties to work and earn their financial condition, their status and position in life will all have to be taken into consideration. The Court should consider the means and the income of the parties, the nature of the litigation and allied circumstances and the equities of the parties should be adjusted.⁸⁴⁹ Courts should never lose sight of the fact that except in very exceptional cases a Hindu wife never normally leaves the house of her husband and is never enamoured of staying with her parents after giving up the matrimonial home. Thus the consideration of the wife living with her parents is not relevant in determining the quantum.⁸⁵⁰ In a recent Bombay case in a family of six members, the husband and his father were earning members earning together Rs. 2,200 per month. Interim maintenance of Rs. 350 per month was awarded to the wife on the basis that the share of each member of the family came to Rs. 370 per month. It was held that the rule of the wife not being entitled to not more than one-fifth of the net income of the husband was not only unreasonable but also irrational and cuts at the root of equality of the wife as an equal partner of the husband.⁸⁵¹ The amount fixed as maintenance of wife under section 90 (1) Army Act shall be taken to be fixed for maintenance for the purpose of section 24 of the Hindu Marriage Act.⁸⁵² Since this temporary or interim allowance is awarded without going into the merits, the amount is usually less than the amount awarded as permanent maintenance and is normally restricted to the actual needs of the petitioner if living in comfortable retirement, but the amount should not be on a very parsimonious or miserly scale. If the petitioning spouse is sickly and requires medical attention provision should be made for such treatment also. If notice goes to the respondent in the petition for interim maintenance and the respondent enters objection, it is permissible for the Court to go into the conduct of the petitioner with reference to the question whether she should be held to have forfeited her claim to the consideration in sympathy of her claim, but such enquiry into the conduct must be of a very summary type on *prima facie* material and should not take the form of a very elaborate and exhaustive investigation of the charges and counter-charges of the spouse which ought to be reserved for the hearing on the main case. No interim maintenance ought to be awarded where the respondent to the petition denies the marriage itself until at any rate the Court tries the issue as to the factum of marriage and finds it as true.

(846) *Sudharpan Kumari v. Chhagay Singh*, 1978 Kash. L.J. 1; *Mukun Kumar v. Ajaychand*, 1958 Raj 3/2; *Sushila Devi v. Dhoni Ram*, 1965 M.P. 12; *Praganna Kumar v. Sureswari*, 1969 Orissa 12. See however *Dinesh v. Usha*, 1979 Bom. 173.

(847) *Raghavaji v. Bharatamma*, (1975) 2 A.P.L.J. 17; 1975 An. L.T. 357; *Preeti v. Ravindra*, 1979 All. 29. See also judgment of the Bombay High Court in L.P.A. No. 61 of 1977 dated 7th March, 1978.

(848) *Pushpa Rani v. Asha Nand*, (1971) 80 Punj. L.R. 300; *Usha v. Sudhir Kumar*, (1974) 76 Punj. L.R. 195.

(849) *Preeti v. Ravindra*, *supra*.

(850) *Usha v. Sudhir Kumar*, *supra*.

(851) *Dinesh v. Usha*, 1979 Mah. L.J. 367 1979 Bom. 173.

(852) *Sripriya Mahpa v. Capt. Arvind Kumar Mahpa*, (1978) 80 Punj. L.R. 215.

6. *Time for application for interim maintenance*—The section does not men ion any time for the presentation of a petition for interim maintenance. Normally when the petitioner asks for interim maintenance and costs, a petition for such maintenance and costs may be presented along with the main petition for any of the reliefs for matrimonial offence under Act. The order on the petition may normally be passed only after notice to the respondent. The respondent may apply for interim maintenance pending the proceedings at any time after entering appearance to the petition.⁸⁵³ When the petition for interim relief is filed by the respondent in the main petition, notice should be issued to the petitioner in the main petition, and it is after hearing the respondent that suitable order can be made. A question may arise in the case of a petition for interim relief as to what should be done where the respondent in the main petition is *ex parte*. In such a case after the Court is satisfied that notice of the interim petition has been served on the respondent in that petition there is jurisdiction in the Court to make the aforesaid order for the interim relief. No doubt such order must necessarily be founded on the allegations made in the petition and such evidence as the petitioner may adduce without being contradicted on account of the respondent remaining *ex parte*. This, however, does not prevent the respondent from subsequently coming before the Court and having the *ex parte* order cancelled or modified on showing cause. The fact that the wife did not ask for legal expenses in the lower Court will not preclude her from applying for the same in the appellate Court.⁸⁵⁴

In *Dr. Tarlochan Singh v. Smt. Mohinder Kaur*.⁸⁵⁵ It was held that though this section is applicable only to the proceedings in the trial Court, it is open to a party to apply to the appellate Court also for the relief under this section by reading section 21 of the Act with section 107 of the Civil Procedure Code. *Arya Kumar Bai v. Smt. Ha Bai*.⁸⁵⁶ It was further held in that case that where there is default in payment of the maintenance under this section and the party aggrieved moves the matrimonial Court, that Court can stay proceedings till the order has been complied with.

7. *Expenses of proceedings*.—The word "expenses" is a word of wider connotation than costs and includes costs. It is not limited to the costs that would be payable to a party and party taxation under the rules of the Court.⁸⁵⁷ Section 24 does not lay down as to what should be the amount in a litigation under the Hindu Marriage Act for meeting the expenses of the proceedings. This too has also not been laid down in Section 24 except to say that the amount shall be a reasonable one taking into consideration the income of the parties. The entire discretion is left with the Court.⁸⁵⁸ Reasonable Court expenses should be granted.⁸⁵⁹ The allowance for costs must be sufficient to ensure to the petitioner an efficient

(853) Cf. *Srinivasulu v. Papamma*, 1973 A.P. 31. [Even in the course of suit for Section 18 of the Hindu Adoptions and Maintenance Act, 1956, by the wife she can claim Section 24, Hindu Marriage Act in proceeding under Section 9 instituted by her husband.]

(854) *Sivakumari v. Rangaraj* (1954) 2 M.L.J. 397.

(855) 1963 P.M.J. 249.

(856) 1968 Cal. 276.

(857) *L.D. Chhabra v. D.S. Chhabra*, 1974 Bom. 82, 86 [note in the context of S. 36, Special Marriage Act] See also *Sahjee Rao v. Annapurna*, 1957 A.P. 170 [case under the Madras Hindu (Bigamy Prevention and Divorce) Act, 1954].

(858) *Puri v. Ramji*, 1973 All. 29. See also *Puri v. Mahesh Singh*, 1975 Raj. 32.

(859) *Prasanna Kumar v. Sarvagari*, 1979 Orissa 12.

presentation of her or his case, in the controversy. In making the allowance, due regard will also be had to the character of the litigation, the legal services necessary to be secured, the expenses to be incurred in getting the witness to the Court and all other matter which the Court can see, may tend to lessen or increase the probable expenses of the conduct of the proceeding.

If the mental attitude and the financial ability of the husband are such that he will surely make a very determined and expensive contest, it is necessary that his wife also must have a fair opportunity to present her side by employing efficient counsel as against the counsel of the husband and therefore the husband should be made, where the means of the wife are not sufficient to meet such expensive defence, to pay her the necessary funds which would enable her to contest the matter efficiently. In the western countries, expenses incurred by the wife in employing detectives to find out the infidelities of the husband were included, but there is no such provision in this Act because the words "necessary expenses of the proceeding" would include only the expenses incurred from the initiation of the proceeding to the termination, and not any expenses incurred prior to the proceeding. Under Section 24, according to one decision the Court must normally direct the payment of the expenses of the proceeding and the Court's own idea about such expenses does not come into the picture. The trial Court is expected to know the amount of expenses required for court-fees, cost of judicial papers, typing expenses, process fee, diet money for witnesses, Commission fees, fees of medical or other expert witnesses to be examined, the usual fees charged by counsel in that particular Court for undertaking the prosecution or defence of such cases. Once the Court finds that the applicant has no independent means of meeting the expenses it has no discretion in the matter of judging the reasonableness of the proper amount of litigation expenses.⁵⁵⁰ To allow expenses of the proceedings the Court will first determine whether as a question of fact such expenses were incurred and secondly whether they were necessary.⁵⁵¹ The expense of the proceeding—whether the expense of the petitioner or of the respondent—has to be ordered to be paid in a lump amount. This seems to be the effect of the wording in Section 24, when it is contrasted with the wording employed with reference to the payment of maintenance which is "that it may be paid monthly during the proceeding". When it is decided by the Court that the expenses of the proceeding should be ordered to be paid to the petitioner, there is no justification for ordering only a portion of the expenses, and the discretion given in respect of the payment of the maintenance allowance monthly based upon the income of the parties does not appear to have any place in this regard.

A lump sum amount allowed to the petitioner for expenses for the main case includes all expenses to be incurred over interlocutory applications also. The expenses of each such application cannot be separately claimed.⁵⁵²

An order upon an application under this section for maintenance and expenses of litigation *pendente lite* is appealable under section 28: *Tarlok Singh v. Smt. Mohinder*.

25. Permanent alimony and maintenance.—(1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on

(550) *Usha v. Sudhir Kumar*, (1974) 76 Punj. L.R. 198.

(551) *Prati v. Kailash Singh*, 1975 Raj. 52.

(552) *Dipu v. Schmidt*, (1976) 78 Punj. L.R. 236.

(553) 1981 Punj. 506; I.L.R. (1980) 2 Punj 700.

application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, * * * pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property of the applicant * * (the conduct of the parties and other circumstances of the case) it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent:

(2) If the Court is satisfied that there is a change in the circumstance of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.

(3) If the Court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock * * [it may at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just].

Section 25—Synopsis

1. Scope.

1-A. Section 25 is *a la* the Hindu Adoptions and Maintenance Act.

1-B. Court exercising jurisdiction under this Act.

2. Order may be made either at the time of the decree or subsequently.

3. Application by either spouse permissible.

4. Delay in making the application.

5. Payment in one lump or instalments.

6. Amount to be fixed having regard to the income or the properties of the parties.

7. Conduct of the parties.

8. Conclusiveness of the finding as to maintenance rate.

9. Forfeiture of maintenance by misconduct.

10. Variation of the order of maintenance.

11. Power of Court to enforce payment of maintenance etc.

12. Miscellaneous.

1. Scope.—This section deals with permanent maintenance as contrasted with the interim maintenance provided for in the previous section. This permanent maintenance called permanent alimony has to be ordered by the Court exercising jurisdiction under this Act in respect of the main petition for relief.⁸⁸⁴ The order may be made at the time of passing the decree or subsequently.⁸⁸⁵ Since under the section the Court may award maintenance on application made at the time of passing any decree or at any time subsequent thereto permanent alimony cannot be granted when a petition for relief is dismissed.⁸⁸⁶

⁸⁸⁴The words "while the applicant remains unmarried" omitted by Act XLVIII of 1976, S. 18.

⁸⁸⁵Substituted by Ibid for certain words.

(864) *Rameshchandra Bohara v. Sushilata Devi*, 1976 (2) C.W.R. 989.

(865) See *Harilal v. Lilanji*, 1961 Guj. 202; *Shastri v. Hiralal*, I.L.R. (1962) Bom. 195; 1962 Bom 87; *Dhanraj Pranjli v. Bai Sahar Rajji*, 1968 Guj. 150; *Kulraj Ghosh v. Ganga*, (1977) Delhi 124; *Muhammad Najib v. Hanum Rani*, (1974) 2 M.L.J. 237. *Sunandaben v. Jyotsnabai*, (1971) 1 M.L.J. 427.

(886) *Chitra Bala v. Parth*, 1967 Ori.S. 168. See also cases cited in foot-note 869 to 871 infra. See however *Shankaradevi v. Subbarao*, 1976 Mah. L.T. 512 [there is nothing in S. 125 to hold that 'decree' means only a decree granting the relief asked in the petition and not one dismissing a petition].

Section 25 provides a remedy by a simple application in addition to other remedies which may be open to a wife such as a remedy under the Criminal Procedure Code or a remedy by way of a suit under the Code of Civil Procedure. Section 25 must therefore be considered as partly substantive and partly as procedural whether it is described as incidental or ancillary or supplementary or complementary to the main proceeding under the Hindu Marriage Act.⁸⁶⁷ Where a decree for divorce passed by the lower Court against the wife on the ground of her adultery was confirmed on appeal the lower Court can pass an order for maintenance in support of the wife provided she remained without remarrying.⁸⁶⁸ An application is necessary and may be filed either by the wife or the husband. This is unique, because under other Acts there is no provision for payment of maintenance to the husband, and alimony has always been understood both in India and elsewhere as an amount payable for the maintenance of the wife and not of the husband. But it cannot be denied that this provision for compelling the wife to pay maintenance to the husband in appropriate cases is certainly welcome, because cases can easily be imagined where a rich wife deserting her impecunious and indigent husband ought not to be allowed to see her husband, against whom she had a decree for separation or divorce, starve in the streets after having lived with him in opulence and plenty. The maintenance is exigible only so long as the party procuring it does not remarry. The moment he or she remarries, it is open to the other party to ask for cancellation of the order for maintenance. But if there is no remarriage or any supervening circumstance for cancelling the maintenance order, the order is valid and enforceable during the lifetime of the applicant and the amount payable in proper cases may also be secured by a charge on the immovable property of the respondent to the maintenance petition. The quantum of maintenance must necessarily be fixed having regard to the income of the parties and their means and properties, and will be made payable either in one gross sum or monthly or periodically during the lifetime of the applicant. There is a provision for either party applying to the Court to have the order varied, modified, or rescinded on account of the change in the circumstances of either party, at any time after the order for maintenance is made. It is a condition of this order that neither party should remarry, and if the person entitled to maintenance is the wife she should remain chaste, and if it is the husband he should not have sexual intercourse with any woman other than the wife. If this condition is violated, the order shall be rescinded by the Court at the instance of the other party.

The Court is not entitled to pass an order for permanent alimony in favour of the wife when the petition made by the husband for restitution of conjugal rights has been dismissed. *Haral v. Lalapati*,⁸⁶⁹ *Chunababu v. Parbhi*,⁸⁷⁰ *S. v. R.*⁸⁷¹

The use of the words "at the time of passing any decree" in the section shows that the power is intended to be exercised at the time of passing any of the decrees referred to in the earlier provisions of the Act or any time subsequent thereto. The section is equally applicable to proceedings for obtaining a decree for restitution of conjugal rights or a decree for judicial

(867) *Shaktidevi v. Subbarao*, 1976 *Mah. L.T.* 512.

(868) *Raghunath v. Ranj Bala Das*, 1972 (1) *C.W.R.* 717.

(869) 1961 *Guj.* 202

(870) 1967 *Oriss.* 100

(871) 1968 *Delhi* 79. See also cases cited in footnote 869 *supra*.

separation or divorce or nullity of marriage.⁸⁷⁷ It looks as if the terms "wife" and "husband" in the section do not signify an existing relationship as spouses at the time when application under the section is made but as terms to refer to parties who have gone through a ceremony of marriage which is valid or subsisting.⁸⁷⁸ Again the relevant words in Section 25 are "applicant" and "respondent". Since "applicant" has reference to the party applying "respondent" should mean the party opposing the application or against whom an order under the Section is sought.⁸⁷⁹

1-A. Section 25 vis-à-vis the Hindu Adoptions and Maintenance Act.—The power conferred on the Court under Section 25 creates a corresponding right in the wife or husband to get maintenance provided the conditions laid down for the grant of the same are satisfied. Not only does Section 25 (1) provide a remedy but it also confers a right. Since the Hindu Adoptions and Maintenance Act, 1956 is a later legislation it could not have been the object of Section 25 (1) to create a remedy for the enforcement of the right to maintenance under the 1956 Act.⁸⁸⁰ Again while Section 18 of the 1956 Act enables a wife to claim maintenance even without filing any petition for matrimonial relief, Section 25 (1) of the Hindu Marriage Act does not confer such a right.⁸⁸¹ Whereas Section 25 (1) contemplates that not only the wife but even the husband would in certain circumstances be entitled to get maintenance, the 1956 Act does not give any right of maintenance to the husband at all.⁸⁸² The Court's discretion under Section 25 is not controlled by the Hindu Adoptions and Maintenance Act. In a case where the wife has obtained a decree for restitution under Section 9, the Court can grant permanent alimony to the wife under Section 25 without filing a suit for it under the Hindu Adoptions and Maintenance Act.⁸⁸³ Under Section 25 it is not obligatory to grant maintenance as required by Section 23 of the Hindu Adoptions and Maintenance Act. It may be that under Section 18 (3) of the latter Act an unchaste wife will forfeit her separate maintenance granted under that enactment; but that does not mean that the interpretation of Section 25 of the Hindu Marriage Act has to be restricted so as to apply it only to those cases where the wife is not guilty of adultery. Thus the Court has jurisdiction to award maintenance in cases of judicial separation ordered because of an act of adultery.⁸⁸⁴

(872) *Kuldip Chand v. Ganga*, 1977 Delhi 125, 128; *Gopindoo v. Anandibai*, 79 Bom L.R. 73; 1976 Bom. 433, 436; *Munimani Rajoo v. Hemba Ram*, (1974) 2 M.L.J. 237, 240 87 L.W. 537; 1975 Mad. 15; *Deyal Singh v. Bhajan Kaur*, 1973 P. & H. 44; *Sekhder v. Jayalakshmi*, 1968 Mad. 283, 286; *Mina Ram v. Dureeth*, 1969 Cal. 428, 439, but see *Nathulal v. Mona Devi*, 1971 Raj. 208; *Narayanaswami Reddiar v. Padmanabham*, (1966) 1 M.L.J. 529; 1966 Mad. 594; *Gyananaray v. Bai Prabha*, 1968 Guj. 242.

(873) *Nisar Kumar v. Sajida Raza*, 1572 Cal. 4; *Deyal Singh v. Bhajan Kaur*, supra; *Gopindoo v. Anandibai* supra, *Jayalakshmi v. Sujanarayana*, (1971) 1 M.L.J. 427, *Kuldip Chand v. Ganga*, supra [the expression "husband or wife" is used in a descriptive sense convenient to describe the parties].

(874) *Amer Kanto Sen v. Saranya Sen*, 1960 Cal. 486; *Kamla Shama Sundhi v. Shama Rajchand Sundhi*, 60 Bom. L.R. 633, 635.

(875) *Gopindoo v. Anandibai*, supra.

(876) *Ibid.*

(877) *Ibid.*

(878) *Sanku Ram v. Phooli*, 1972 Raj. 313.

(879) *Swaminathan v. Mehta*, 1973 Kar. 272; 1973 Kar. 16, 431.

1-B. Court exercising jurisdiction under this Act.—These words only mean that the order for permanent maintenance can be passed only by the Court exercising the jurisdiction under this Act for the purpose of giving relief in the main petition either by way of restitution of conjugal rights or judicial separation or nullity declaration or divorce. Though the section gives no indication on the question whether either party to a main petition for relief against a matrimonial offence can resort to any other Court for maintenance after the termination of the main proceeding by a decree, and the word “may” appears to make the procedure under this section only optional, and not exclusive, it is fairly clear that inasmuch as the matrimonial Court has been seized of the matter and has gone into the merits of the controversy between the parties and knows who had committed the wrong and where the justice lay, the intention of the Legislature is that the party should only resort to this Court and not to any other Court in the realm for the relief of maintenance. The words “at the time of passing any decree” may support the argument that it is only if the main petition is decreed that a maintenance order for life of the petitioner can be passed by the matrimonial Court and not when the petition is dismissed,⁸⁸⁰ and as by the dismissal of the petition the parties are left in the position in which they were prior to the institution of the matrimonial proceeding under this Act the ordinary Court of the country has jurisdiction to entertain a suit for maintenance. There are two ways of considering this question. One construction is to hold that passing *any decree* includes passing a decree of dismissal of the petition. In this view, the Court having jurisdiction for ordering permanent maintenance is the matrimonial Court under the Act. If, on the other hand, the expression “passing any decree” should be construed as “passing any decree allowing the petition” then the above contention would be plausible.⁸⁸¹ It appears, however, that the former construction is the preferable one. A decree may be a decree allowing the petition or a decree dismissing the petition. The words “any decree” must take in both kinds of decrees. If the latter construction should be considered as the correct one, then the words will not be any “decree,” but merely “a decree.” See *contra* in *Minaram v. Majumdar* ⁸⁸² Besides there is no meaning in allowing the parties to go to some other Court and start their battle once again after they had done it before the matrimonial Court which knows their respective strength and can be expected to do justice, especially when the Court is one of the superior Courts in the country being a District Court or its equivalent.

2 Order may be made either at the time of the decree or subsequently.—The order for permanent maintenance may be made at the time the decree is passed on the main petition or at any time subsequent thereto.⁸⁸³ It may even be that the order for maintenance forms part of the decree. The reason why the section provides that an order may be passed separately and subsequently to the passing of the decree in the main matter is this. In the main matter the enquiry related mostly to the investigation of the causes and consequences of the matrimonial offence and could only have a remote bearing on the question of maintenance. So if the question of the quantum of maintenance which will be appropriate in the circumstances and which could only be decided after evidence with respect to the

(880) *Perushetam v. Das*, 1973 Raj S. See also *Shanmugam v. Malvi*, 65 Bom. L.R. 441; *Shanmugam v. Hrybas*, 1962 Bom. 27, *Kadga v. Kadga*, 1961 Guj 202, *Minaram v. Dasgupta*, 1963 Cal. 428.

(881) *Rameshchandra Behere v. Sashobhan Dn*, 1976 (2) C.W.R. 939.

(882) 1963 Calcutta 428.

(883) See cases cited in fn. no 864 on p. 1103.

respective means and income of the spouses requires further evidence when sufficient evidence had not been let in on that question in the main enquiry itself as in conceivable cases it might not have been, the Court need not take further time with reference to the granting of relief on the main matter and may well postpone the question of maintenance to a further enquiry after the passing of the main decree. Therefore, the provision for an order being passed subsequent to the passing of the decree has been made. It is also pertinent to observe that an order for permanent maintenance can be passed only on an application, and in any particular case that application might not have been made before the passing of the decree, in such a case the order for permanent maintenance must necessarily be after the passing of the decree. This position is not correct and the decision to that effect is overruled by the decision in *Patel Dharmak Prays v. Bas Sakar Kamj*.⁸⁸⁴ This case also holds that even an erring spouse can be granted permanent alimony.⁸⁸⁵ Section 25 does not negative the power of the Court to pass an order for permanent alimony for a wife against whom a decree has been passed at the instance of the husband.⁸⁸⁶ It was further held in *Patel Dharmak's case*,⁸⁸⁷ that the mother cannot include the son's maintenance in her allowance but she can ask for it in a separate proceeding. The question of quantum of maintenance being essentially a matter for investigation on evidence which may not be quite germane to the evidence let in with reference to the matrimonial offence charged in the main petition, it is also proper that it should be in many cases investigated subsequent to the passing of decree as often happens in other ordinary civil suits involving enquiry into profits as in a suit for possession or partition.

In awarding maintenance under Section 25 (1), a finding recorded in a proceeding for judicial separation that the wife had been unchaste can be taken into consideration for reducing the rate of maintenance *Rajagopal v. Rajamm*.⁸⁸⁸

3. Application by either spouse permissible.—It is quite a novel feature of this enactment that this includes a provision for an order for maintenance being passed even in favour of the husband. In the Western Jurisprudence as well as in India under the Divorce Act, there had never been any question of maintenance being made payable by a wife to the husband, except in England, where some such provision has been made when the husband is a lunatic. All the same there can be no denying the fact that this provision is an improvement upon what had obtained in England and India previously. Cases can easily be conceived of the husband being the worse sufferer and deserving sympathy at the hands of the Court, as against a well-to-do ungrateful wife. For instance, the husband suffering from venereal disease or leprosy which might have supervened after the marriage may be the respondent in a petition for divorce or judicial separation by a well-to-do wife. If in such a case the husband should be left in the streets without anybody to take care of him or spend money to relieve his distress and pain from the disease, it does not stand to decency and will certainly be abhorrent to all finer sentiments of conjugal relations and sympathy which ought to subsist in such a contingency. Therefore to arm the Court with a power to direct the wife in such a situation to pay a maintenance allowance to the husband would be perfectly proper and reasonable. This would be so whether the husband is the successful or the unsuccessful party in the main

(884) 1968 Gaj. 150.

(885) See also *Kumbhakarn v. Moha*, 1973 Ker. 273; *Venkatram v. Hanumanth Rao*, 1978 A.P. 6 (1978) 1 An. W.R. 32.

(886) *Lakshman v. Kanna*, 1165 E.I.A. 178; see also cases cited in *l.a.*, [885] *supra*.

(887) 1967 Ker. 181.

petition, whether he is the petitioner or the respondent therein. A further question may arise whether the application for the maintenance can be an oral one. Though the section says an application should be made for the purpose of getting the maintenance ordered, it does not indicate whether it should be in writing and whether it cannot be merely oral. But since the application for maintenance requires fresh evidence in many cases, evidence which is not of the same type or category as the evidence in support or denial of the main matrimonial charge and this application for maintenance has to set out the facts relating to the income of the parties, their expenses, and the amount of the margin of surplus, the conduct that may have relevance in the fixation of the amount, the type of life that the parties led, their status and so many other things which may have a bearing upon the question of the quantum of maintenance ultimately to be decided as awardable, it is preferable to hold that a mere oral application is not intended and that a written application in the form that may be prescribed by the rules made by the High Court should be insisted on.

4. **Delay in making the application.**—There is no limitation for preferring an application for an order of permanent maintenance. The very fact that the petition can be filed even after the passing of the decree shows that there is no time factor that necessarily enters into the question of the maintainability of this application. There is no limitation for preferring an application for an order of permanent maintenance. The expression "at any time subsequent to the decree" does not however, connote unlimited but a reasonable time having regard to all the circumstances of the case.⁸⁸⁸ The question whether there has been unreasonable or improper delay has to be determined on the facts and circumstances and to be a certain extent the Court has a discretion in the determination of the question.⁸⁸⁹ The indication in Section 23 (1) (d) that in any proceeding under this Act, whether defended or not, if the Court is satisfied that there has been any unnecessary or improper delay in instituting the proceeding the Court shall not decree the relief applies only to the main proceeding like a petition for restitution of conjugal rights, divorce, etc., and not to a subsidiary or incidental proceeding asking for an order for maintenance.⁸⁹⁰ In this connection, the difference between the expression "decree" in the closing lines of Section 23 and the expression "order" with reference to the maintenance application, may also be noticed in support of the position that mere delay is not fatal to the maintainability of the application. This, however, does not mean that the Court will not or cannot take into consideration the delay in filing the application in adjudicating on that application. For after all the jurisdiction that the Court exercises in respect of the application for maintenance is essentially a discretionary jurisdiction in the exercise of which the conduct of the parties including delay in the presentation of the application will not fail to influence adversely the judicial mind. *Orvan Klein v. Kathleen Klein*,⁸⁹¹

In *Govind Rao's case*,⁸⁹² the petitioner was driven out of the matrimonial home in March, 1963. On 6th June, 1969 she filed a civil suit for maintenance and on 11th December, 1972 she filed a petition under the Hindu Marriage Act for declaration of nullity of marriage as violative of Section 5 (i) and for maintenance by way of permanent alimony. It was held that in the circumstances there was no unnecessary or improper delay. A delay

(888) *Gopandao v. Anandibai*, 1976 Bom. 433.

(889) *Ibid.*

(890) See *Jagdish Prasad v. Manjula*, 79 Cal. W.N. 548 [Section 23 cannot override Section 25].

(891) 1954 Cal. 406.

(892) 1976 Bom. 433.

of seven and a half years in filing an application for permanent alimony after passing of decrees absolute was allowed and the application was considered to be within reasonable time in the special circumstances of the case.⁸⁹⁸ An agreement between the parties cannot extend the reasonable time indefinitely.⁸⁹⁹

5. Payment in one lump or instalments.—The amount awarded by way of maintenance may be made payable either in a gross sum or in such monthly or periodical amount as the Court may determine, for a term not exceeding the life of the applicant. Whether to grant a gross sum or a periodical payment is a matter of discretion of the Court and depends on what is reasonable in the circumstances of the case.⁹⁰⁰ A lump payment may be directed where the husband had made substantial acquisitions during marriage towards which the wife had made a significant contribution.⁹⁰¹ Lump sum payment should not be ordered unless the respondent has capital assets from which the amount can be paid without reducing that person's earning power.⁹⁰² Where a husband is ordered to secure to the wife a gross or annual sum of money by way of permanent maintenance it may restrain him by injunction from dealing in the meanwhile with his property so as not to affect his leaving sufficient security.⁹⁰³ Where the amount of permanent alimony is made a charge on the movable and immovable property of the respondent such a charge is not admissible in so far as the provident fund amount of the respondent is concerned in view of Section 3 of the Provident Funds Act, 1963.⁹⁰⁴ If the amount is paid in a lump sum, that would endure during the lifetime of the petitioner and any subsequent misconduct on his or her part can have no effect in making the applicant forfeit that amount so as to justify an order for repayment of the amount or a proportionate part of it to the respondent. *Nani Gopal v. Ramu Bala*.⁹⁰⁵ In the case of a periodical sum being made payable either every month or otherwise the same may be varied at the instance of either party owing to change in the circumstances or may be stopped altogether for the misconduct mentioned in sub-section 3. Whether it is variance or cessation of the periodical payment, an order of the Court is necessary and the respondent cannot take the law into his own hands and justify his conduct in reducing or stopping the periodical payment alleging misconduct on the part of the applicant or change in the circumstances justifying such course.

6. Amount to be fixed having regard to the income or the properties of the parties.—The section provides that the amount of maintenance has to be fixed by the Court having regard *inter alia* to the respondent's own income and other property, if any, and the income and other property of the applicant and that the amount should be just in all the circumstances. It is the net income that is to be taken into account. Net income signifies the income that remains after allowing for expenses of collection, income-tax, wealth tax and similar deductions.⁹⁰⁶ Inescapable expenses should also be taken into account.⁹⁰⁷

(898) *Haining v. Haining*, (1547) 2 All E.R. 744; see also *Shost v. Skott*, (1952) 1 All E.R. 735; *Deacock v. Deacock*, (1936) 2 All E.R. 633.

(899) *Fisher v. Fisher*, (1942) 1 All E.R. 438.

(900) *Jaylor v. Bleah*, 17 Bom. L.R. 56; see also *Pratima v. Kamal Kumar*, (1964) 68 Cal. W.N. 316.

(901) *O'Donnell v. O'Donnell*, (1975) 2 All E.R. 808; *Cumbers v. Cumbers*, (1979) 1 All E.R. 1.

(902) See *Wachtel v. Wachtel*, (1973) 1 All E.R. 329.

(903) *Burrows v. Burrows*, (1929) 45 T.L.R. 347, 401; *Nani Gopal v. Ramu Bala*, 1965 Orissa 156.

(904) *Durga Devi v. Tara Rand*, 1971 F. & H. 141, 144.

(905) 1965 Orissa 134.

(906) *Kurukshetra v. Kurukshetra*, 1958 Mad. 340; *Lobo v. Lobo*, 1959 Cal. 753; *R v. R*, 14 M.L.R. 88.

(907) *Kershaw v. Kershaw*, (1964) 3 W.L.R. 1143.

Net income does not connote what is left after the spouse under liability has spent all that is necessary for his or her own maintenance.⁹⁰⁸ The net income of the concerned party must be decided in each case on its facts.⁹⁰⁹ Where there is nothing to show the assets or the income of the wife, the alimony must be determined on the basis of the husband's income.⁹¹⁰ There is no hard and fast rule with reference to the determination of the appropriate quantum of maintenance whether it is the wife or the husband that is made entitled to it. A fair test that may be adopted is the test enunciated by the Privy Council in *Ehrhardtsson's case*.⁹¹¹ "Maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members on a reasonable view of change of circumstances possibly required in the future, regard being of course had to the scale and mode of living and to the age, habits, wants and class of life of the parties. In short, it is out of a great category of circumstances, small in themselves, that a safe and reasonable deduction is to be made by a Court of Law in arriving at a fixed sum." It was further observed that the sum awarded must enable the applicant to live as far as may be consistently with her position in something like the same degree of comfort and in the same reasonable luxury of life as she had before, with this addition that there may be circumstances in which the past mode of life of the applicant has been demonstrably on a penurious and miserly scale or on the other hand on a quite extravagant scale having regard to the total income. These observations may well apply to the case of determination of the appropriate quantum of maintenance awardable to the applicant under this section, with this qualification that in the determination of the appropriate amount, it is not only necessary to take the income and the property of the respondent and the applicant but also the conduct of the parties to the petition. See *Lola v. Minsharwal*.⁹¹² For a long time in England the practice had been to award the wife the difference between one-third of the total income of the husband and wife and the wife's separate income. But this arithmetical ratio in considering the quantum of maintenance to be awarded has not been adhered to and has in fact been adversely criticised. After all, the matter being one of discretion for the Court, which in the exercise of that discretion has to take so many facts and circumstances as indicated by the Privy Council in *Ehrhardtsson's case*⁹¹³ it is not correct or proper to insist upon any proportion being observed in the matter, especially when the quantum has to be regulated in appropriate cases by the conduct of the parties. In *Jagdish v. Mangals*⁹¹⁴, it was held that though the conduct of the parties may be a relevant factor in deciding a case of permanent alimony under Section 25 each case has to be decided on its own merits and as the Court is entitled to use its discretion depending on the facts of the case one third of the admitted net income amounting to Rs. 450 per month can be awarded. If the conduct of the applicant has been condemnable for any of numerous reasons that can be easily imagined, he or she should not have the same generous consideration at the hands of the Court as if his or her conduct had been less blameworthy. In the same way if the conduct of the respondent to the petition has been

(908) *Lola v. Lola*, 1989 Cal. 753.

(909) *Jagdish v. Minsharwal*, 1975 Cal. 64; *Sahni v. Sahni*, (1935) P. 105.

(910) *Jagdish v. Minsharwal*, *supra*.

(911) 1929 P.C. 182.

(912) 1929 M.P. 349.

(913) 1929 P.C. 182.

(914) 1975 Cal. 64.

abhorrent to all moral principles and sentiments of decency and decorum and deserving of no sympathy from the Court, any plea from such respondent for reduction of the maintenance amount asked for will have no favour. The conduct here mentioned is the matrimonial conduct on which the adjudication has been made in the main petition and such other conduct on the part of the parties which came to light in the enquiry but which was not the ground of complaint in the main petition. In the same way as a party cannot be allowed to take advantage of his or her own wrong in the main proceeding filed by him or her as provided under Section 23 (1) (a), so also even in the matter of obtaining maintenance permanently under this Section, the previous conduct brought out in the evidence in the investigation of the ground of the relief under the Act, be it by way of restitution of conjugal rights, or judicial separation, or dissolution of the marriage, will all be taken into consideration in moulding this relief by way of maintenance.

In estimating the respondent's income the possibility of her inheriting property from her relations should not be taken into account.⁽¹⁰⁾ Likewise in assessing the petitioner's income the possibility of his contracting a second marriage with consequent increase in his expenses is not to be considered.⁽¹¹⁾ The existence of a child of the earlier marriage will however make a difference in the sense that the educational expenses of the child should be deducted in full from the husband's income before arriving at the income available for division between the spouses.⁽¹²⁾ The rule of one-third of the husband's income is not absolute.⁽¹³⁾ Courts in England have fixed permanent alimony at one half of the income in some cases having regard to special facts.⁽¹⁴⁾ A husband in the wrong cannot argue that the wife should work and earn to relieve him from having to pay maintenance.⁽¹⁵⁾ Nor is there any obligation cast on her when once her marriage has come to an end for no fault of hers to earn her living with a view to reduce her husband's liability to maintain her.⁽¹⁶⁾ In *Krishnam v. Padma*,⁽¹⁷⁾ though possessed of high qualifications the wife was not employed at the relevant time. The husband had a net income of Rs. 444 per month. The grant of Rs. 120 per month to the wife was in the circumstances held to be just and proper.

If a lump sum has been ordered in full quit of the maintenance claim the fact that the applicant has dissipated that amount would be no ground for justifying him or her to apply again for maintenance. Though the parties cannot contract out of a statutory right given to them in the interest of public policy and social well-being he or she having received an adequate amount in full discharge of the claim ought not to be allowed to go back on that arrangement.

7. *Conduct of the parties.*—The section lays down that in the matter of the determination of the quantum of permanent maintenance awardable to either spouse on the

(10) *Lalithamma v. Kanna*, 1906 Myn. 178.

(11) *Subramanyam v. Saravathi*, 1924 Myn. 28.

(12) *Widdow v. Widdow*, (1960) 3 W.L.R. 252.

(13) *Sidda v. Sidda*, (1931) F. 103; *Gedgar v. Gedgar*, (1976) 2 All E.R. 81.

(14) *Allen v. Allen*, (1952) 31 L.J. (P.M. & A.) 516; *Watts v. Watts*, 20 L.J. P. & M. 151; *Quinn v. Quinn*, 1931 Outh. 203.

(15) *Roe v. Roe*, (1939) 2 All E.R. 311.

(16) *Lalithamma v. Kanna*, supra.

(17) 1949 Myn. 236.

application made by that spouse either at the time of the passing of the decree or subsequently thereto, the conduct of the parties is not only a relevant but a very material consideration that ought to be taken into account. Decisions in England have held that the words "conduct of the parties" cover the conduct of the parties both before and after the marriage.⁽⁹¹⁸⁾ In deciding a claim for permanent alimony the party applying must be presumed to be innocent⁽⁹¹⁹⁾ till the contrary is proved. The conduct of the parties includes not only the conduct of the applicant to the award of maintenance but also the conduct of the respondent against whom such award is asked for: *Clear v. Clear*.⁽⁹²⁰⁾ Taking the conduct of the petitioner who happens to be the wife, if it is found that subsequent to the marriage she had thrown to the winds the solemn vows of matrimony and treated the husband with scant courtesy and affection with the result that the husband had been forced to live away from the wife which has occasioned the petition by the wife for judicial separation and the wife after the decree for judicial separation applies for permanent maintenance against the husband, what justification will there be for the Court to consider her case with any sympathy and be generous to her in the award of maintenance? In such a case she cannot complain if she is given only a bare maintenance confined to the actual necessities of food, raiment and shelter. The fact that the husband is a man of means who can well afford to pay her decent maintenance which will enable her to live a life of luxury and ease, cannot induce the Court to consider her request to be more liberal in the matter of fixation of the rate of maintenance. Similarly taking the case of a husband who files an application for permanent maintenance against his opulent wife after misunderstanding had arisen between the parties and the husband had to file a suit for any of the reliefs under Sections 9, 10, 12 or 13 of the Act, if it is found that in fact and in deed it was the husband that really drove the wife into the arms of another and forced her to immoral ways on account of his negligence and indifference and cruelty to her, no Court will view this application for maintenance with any favour or sympathy. Cruelty of the petitioner, the indifference to the claims of affection and care expected by the other spouse of the marriage, continued life of shame and adultery on his or her part and in short conduct that will evoke abhorrence and righteous indignation on the part of any body will be duly considered to whittle down the maintenance allowance that otherwise will be decent and handsome. This is after all another application of the well-known principle embodied in Section 23, namely, that no one should be allowed to take advantage of his own wrong. The position in the case of an application for permanent maintenance is entirely different from the position in the case of an application for interim maintenance. No doubt in both the matters anybody can apply and the evidence must relate the practically to the same facts and circumstances. However, there is this difference:

In the case of an application for interim maintenance the investigation should stop with the *prima facie* case presented by either party for the consideration of the Court. In the case of an application for permanent maintenance all the circumstances of past living, the status of the parties, their financial conditions, their means and assets, their ways of life and their place in society and reputation have all to be exhaustively and comprehensively considered and the appropriate quantum of maintenance has to be arrived at. There is also this difference between the two cases. In the case of an application for interim maintenance, it is very rarely and only in exceptional cases that the Court really goes into the question of

(918) See *Renell v. Renell*, (1930) P 189.

(919) *Jagdish v. Mangale*, 1975 Cal. 64; *Dr. Hormugli v. Dabhi*, 1955 Bom. 413.

(920) (1938) 1 W.L.R. 467.

the conduct of the parties prior to the presentation of the petition. But in the case of an application for permanent maintenance the conduct is statutorily insisted upon as a factor to be considered as virtually affecting the question of quantum. After all in the case of interim maintenance it is a tentative, temporary and provisional fixation not intended to be operative beyond the termination of the main proceeding. But in the case of an application for permanent maintenance, it involves fixation of an amount which is to endure not for a temporary period but during the life of the applicant. With these differences in view the Court has to approach the question of awarding permanent maintenance. The two vital considerations enjoined by the statute being: (1) the means of the parties, and (2) their conduct, an order made without proper advertence to these two considerations will be one that deserves to be upset in the case of an appeal against such order.

While a number of decisions have held that where there is a finding of unchastity of the wife in proceedings for matrimonial relief, the wife should not be entitled to maintenance under Section 25,⁹²¹ a different view is expressed in a number of other decisions.⁹²² The expression "conduct of parties" is not intended to take away the jurisdiction of the Court absolutely in the matter of awarding maintenance and Section 25 is not intended as a punitive measure but to reform people against whom an order for judicial separation or divorce has been passed.⁹²³ The mere fact of the wife's cruelty that led to the judicial separation between the spouses is not by itself sufficient to disentitle the wife to alimony.⁹²⁴

In the case of an unchaste wife whose marriage has been dissolved on account of her living in adultery, bare maintenance allowance or starving allowance alone is permissible, and if she is earning her living and is not in a helpless position, even this claim for starving allowance disappears, because the allowance envisaged by this section is made to prevent starvation, and is not claimable as a matter of absolute right irrespective of the conduct of the claimant or her financial position. *Amar Kanta Sen v. Savana Sen*.⁹²⁵ See also *Sachindram Bhow v. Benamala Bhow*,⁹²⁶ (wife living in adultery).

Where it was found that the conduct of the wife was relatively less blameworthy than that of the husband, then, notwithstanding the passing of a decree against her, she can claim as full a maintenance as if a decree had been made in her favour or at least in favour of both parties.⁹²⁷

8. Conclusiveness of the finding as to Maintenance Rate.—Ordinarily the rate of maintenance fixed by the Court after due advertence to the two vital considerations mentioned by the section, namely, the means of the parties and their conduct, will not be interfered with by the Appellate Court. The determination of this question is one of fact and

(921) *Sachindra, Nali v. Benamala*, 1960 Cal. 573; *Rajagopalan v. Rajamma*, 1967 Ker. 181; *Sardesai v. Pithaw*, 1970 J. & K. 181.

(922) *Amar Kanta v. Savana*, 1960 Cal. 438; *Raghunath v. Rani Bala Devi*, 1972 (1) C.W.R. 217, *Kanya Ram v. Mala*, 1973 Ker. 273; *Varalakshmi v. Hanumanthappa*, (1978) 1 An. W.R. 32 1978 A.P. 6.

(923) *Abhaya v. Mala*, *supra*.

(924) *Jagdish v. Malhotra*, 1975 Cal. 61.

(925) 1960 Cal. 1288.

(926) 1960 Cal. 573.

(927) *Tremble v. Tremble*, (1956) 1 All E.R. 618.

though it is dependent upon the evidence to be adduced by the parties it does not cease to be a question of fact, still. But if the relevant considerations that ought to weigh with the Court have been ignored, the Appellate Court may well interfere with the finding on the ground that it is vitiated by failure to consider an important fact as enjoined by the statute. The grounds for interference with the fixation of the rate are as follows:—(1) Failure to consider the two matters of means and conduct of parties, (2) shutting out evidence on either of these matters, (3) misreading the evidence upon them, and (4) importing into the enquiry other collateral matters not germane to the controversy

9. Forfeiture of maintenance by misconduct.—The Court is vested with discretion under Section 25 (3) to vary, modify or rescind the order granting maintenance if in case of the wife she has not remained chaste after the passing of the order and where the husband is the recipient he has had sexual intercourse with any woman outside wedlock. In an application under Section 25 (3) it is not necessary that the charge of unchastity must be proved beyond all reasonable doubt. The Court can act on the preponderance of probabilities.^{***} If the wife or the husband remarries after an order for permanent maintenance in her or his favour then such re-marriage is a ground for cancelling the maintenance awarded, because except in case of divorce and nullity decrees the assumption of the continuance of the earlier marriage which is a condition precedent for the continuance of the liability to pay the maintenance is taken away. Also if the wife, who has obtained the order of maintenance in her favour is subsequently found to be unchaste that is also a ground for the application being made by the husband for cancelling the order of maintenance. Similarly, if the husband has obtained an order for his maintenance at the expense of his wife, and he has sexual intercourse with another woman, such conduct on his part is a ground for the wife to move the Court for cancelling the maintenance order. As regards the husband there is one other matter to be noticed. That is this, the maintenance allowance is conditional only upon the the husband not being immoral or not marrying again. If the husband is not immoral but continues to have intercourse with a wife whose marriage with him has not been dissolved, but on account of the subsistence of whose marriage there has been a decree for a divorce under section 11 or section 13 at the instance of the wife of the second marriage who, in her petition for nullity or divorce, had been asked to pay maintenance to the husband, there is no question of immorality and in such a case the maintenance order obtained by the husband need not be cancelled.

10. Variation of the Order of Maintenance.—The amount of maintenance fixed by an order under this section is liable to be varied by enhancing it or by decreasing it on account of the change in the circumstances of either party. If at the time of the fixation of the maintenance amount, the party in whose favour it is ordered to be paid was in poor circumstances as he or she might have been but if subsequently the condition of that spouse had vastly improved and he or she is in a position to maintain herself in decent comfort and luxury, there is a change in the circumstances of the applicant and it is open to the respondent to move the Court for either reduction of the rate of maintenance or for rescission of the order altogether. The converse case may also be presented which would entail the increasing of the maintenance allowance. If at the time the maintenance order was made the husband against whom the order has been passed was not in very good circumstances

which resulted in a small amount being fixed as the rate of maintenance to be awarded to the wife and subsequently his financial condition improves enormously and the original rate awarded must in the circumstances be considered as poor and miserly, the wife can well petition the Court for increasing the rate appropriately in conformity with the improved condition of the husband.

11. Power of Court to enforce payment of maintenance etc.—The Court has got power when it has made an order on the husband to pay interim maintenance and expenses of the litigation to the wife during the pendency of the husband's action for restitution of conjugal rights, to stay the trial of the suit till the amount is paid, under the inherent powers of the Court and not to drive the wife to the dreary and dilatory process of execution: *Anita Karmakar v. Birendra*.⁸⁸⁹

12. Miscellaneous—The date from which permanent alimony falls to be paid is ordinarily stated in the order.⁸⁹⁰ In the absence of anything stated in the order alimony runs from the date of the final decree.

Where a husband's petition for divorce was dismissed without any order on interlocutory petition by wife for her maintenance being passed and on appeal the order of dismissal of the application for divorce was set aside and the divorce petition was remanded for fresh trial it was held that the interlocutory application made by the wife to the trial Court for granting maintenance under Section 25 (1) had ceased to exist merely because the petition for divorce had been dismissed but when the dismissal order was set aside and the matter remanded the wife's interlocutory application automatically revived and there was no need for the wife making a fresh application for obtaining the relief she claimed earlier.⁸⁹¹

If after the maintenance decree, cohabitation by the couple is resumed, such resumption would nullify the decree on whatever ground it was based.⁸⁹²

Where an application for alimony was dismissed at the time of the passing of the decree it cannot be made subsequently unless there is a change in the circumstances.⁸⁹³

26. Custody of children.—In any proceeding under this Act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

(889) 65 Cal. W.N. 796.

(890) *Ram Puri v. Puri Lal*, 1970 P. & H. 341.

(891) *Prakashini v. Hanumanth Rao*, (1978) 1 An. W.R. 32; 1978 A.P. 6.

(892) *Anurpa v. Rajalaksh*, 1971 A.P. 296.

(893) *Sushila v. Jagannathan*, 1964 A.P. 247.

Section 26—Synopsis

- | | |
|---|------------------------------|
| 1. General. | 3. Children to be consulted. |
| 2. Principles on which orders are made. | 4. Maintenance |

1. **General**—This section provides for the Court making suitable orders for the custody of the children of the parties in any proceeding under this Act, and empowers the Court to pass such interim orders as to their custody, maintenance and education as may be just and also orders subsequent to the decree with reference to such matters. The proceeding in which the order as to custody is to be passed may be any proceeding for any of the reliefs provided for under the Act for a matrimonial offence, such as, for restitution of conjugal rights, judicial separation, nullity of marriage or divorce. Under Section 26 the jurisdiction to pass orders with respect to the custody, maintenance and education of minor children continues even after the main proceeding initiated under the Act has come to an end. These orders are essentially in the nature of interim orders and are liable to be modified, revoked or suspended if there be a change in the relevant circumstances of the parties.¹ Even where the decree in the main petition provides for it the Court does not become *functus officio* but is entitled, on application made by either party by petition, to make further or other orders for the custody, maintenance and education of the children as if the Court still continues to be seized of the main proceeding. It is obvious that this section is intended to serve a very necessary purpose when the parents are wrangling in the Court, namely, the maintenance and education of the children should not be made to suffer due to the misunderstanding between the parents.

The expression "minor children" used in this section will include children either born of the marriage or born to the parties prior to the marriage, or born of marriages which had been declared a nullity, or avoided by a decree of nullity or dissolved by a decree of divorce. In the case of children belonging to only one of the parties by a prior marriage, this section is not intended to apply, because in such a case there is not going to be any question of the custody of those children, because they must be in the custody of the parent to whom they belong. When by adoption either of the parties has a child, that also will be included in the expression "minor children" unless it be that the adoption was made by the wife prior to her marriage, as she well may under the Hindu Maintenance and Adoptions Act. It may happen that children born to either of the parties, prior to the marriage in question, might have been living with the parties and treated by both of them as members of the family. Since by the rift between the parties some provision has to be made for the custody, maintenance and education of those children also, it does not appear to be an unreasonable construction of the word "children" to make it include such children also, though normally the order should be that those children should be in the custody of the person to whom they belong.

2. **Principles on which orders are made.**—On the question as to the proper custody of the children born to the parties, the various considerations that are generally urged under the Guardians and Wards Act, for determining the proper custody may be considered under this section also. Where there is a provision in the decree for such custody, maintenance and education, the rule that once a decree is made it is unalterable except on review or on appeal does not apply. The reason probably is that the decree in the main matrimonial cause deals with the matrimonial offence and it is only incidentally that it embodies a provision for custody of the children. Such a provision is not a fundamental or a necessary term

(934) *Mumtaz Raza v. Hosain Raza*, (1974) 2 M.L.J. 337; 87 L.W. 557; 1975 Mad. 15.

of the decree, for it may well happen that the spouses may not have any child at all or any such child or children they may have might have passed the age of minority.

This section enacts only an optional provision⁸⁸⁸ which may be availed of by either of the parties and does not bind them to have the proper custody of the minor children determined only by the matrimonial Court. There is nothing to prevent them from resorting to the ordinary Courts of the country for the determination of the proper custody of the minor children, and for the protection of their property, if any.

In dealing with an application under Section 26, in the case of a Hindu, the Court should be guided by the considerations underlying the Hindu Minority and Guardianship Act, 1956.⁸⁸⁹ Subject to the provisions of the latter Act, regard may be had to the following principles. The interest and welfare of the child is the paramount consideration with the Court.⁸⁹⁰ *Prima facie* the innocent party is entitled to the custody of the minor child.⁸⁹¹ The controlling consideration however is the welfare of the minors and not the right of their parents.⁸⁹² The welfare of the minor comprehends moral and religious welfare as well as the child's physical well-being and due regard must be had to the ties of affection.⁸⁹³ Where the father had married a second time, the mother, the first wife was appointed guardian of her female child aged about two and a half years and given custody till the child attained eighteen years with liberty to the father to take the child to his house for three days in every quarter and in addition to visit the child in her mother's house at all convenient times.⁸⁹⁴ Where the mother had brought up the minor children showering maternal affection on them while the father remained completely indifferent to their welfare it was held that it was for the welfare of the minors that they should be brought up by the mother.⁸⁹⁵

3. **Children to be consulted.**—In making the order for the custody, maintenance and education of the children, in addition to the wishes of the parties to the proceeding, the wishes of the minor children also have got to be consulted and considered.⁸⁹⁶ No doubt if they are too young to have wishes of their own and such wishes as have been expressed by them are really the wishes of either of the parents who have influence over them, the Court will have to take an overall picture of all the circumstances and come to such decision as will serve the

(885) *Son Anand Devi v. Dr. Khanna Singh*, 1960 Punj. 326.

(886) *Chandra Prakash v. Prem Nath*, 1969 Delhi 281; *Rathi Bai v. S. K. Modhwar*, 1971 M.J.L. 60; *Gauti v. Shrinani*, 1972 Raj 256.

(887) *Saranwati v. Dhankhoti*, 47 M.L.J. 614; 48 Mad. 299; 1924 Mad. 873; *Re Gullai and Lillai*, 32 Bom. 50, 54; see also *Raj Jyoti v. Jyoti Chakramahal*, 1973 S.C. 2090.

(888) *Mackinlay v. Mackinlay*, 1932 Oudh. 162.

(889) *Raj Jyoti v. Jyoti Chakramahal*, *supra*.

(890) *Saranwati v. Dhankhoti*, *supra*.

(891) *Kallappa Goundan v. Valliammal*, 1949 Mad. 605.

(892) *Palani v. Maryan*, 1975 Mad. 322.

(893) *Saranwati v. Dhankhoti*, *supra*; In the matter of *L.J. Fath*, 1944 Cal. 653; *Re [Shankar] Valliammal Appender v. Thirai Goundan*, 1950 Mad. 323. [N.B. Section 26 itself states that the order must be "consistently with their wishes".]

interest of the children. The principles applicable under the Guardians and Wards Act in such matters may well be invoked for coming to a just conclusion in an application under this Act. *Annash Drai v. Dr. Khasan Singh* ⁹⁴⁴

4. Maintenance.—Section 26 vests a discretion in the Court to make an order for maintenance of children *pendente lite* on application made for the purpose.⁹⁴⁵ Even while granting maintenance *pendente lite* to the wife or husband as the case may be regard should also be had to Section 26 and in the application for interim maintenance by the wife under Section 24, the Court can grant relief to the children also under Section 26 in a proper case.⁹⁴⁶ Where the amount needed for the child's maintenance has not been included in fixing its mother's alimony she may seek the child's maintenance in separate proceedings.⁹⁴⁷ The fact that the minor child is living with his mother is not a ground by itself for refusing him relief by way of maintenance and it is wrong to presume that unless the father can spare some money after maintaining himself, his aged mother and his brother he has no legal obligation to maintain his own minor son, of course in accordance with his status and standard.⁹⁴⁸

27. Disposal of property.—In any proceeding under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife

NOTES

This section empowers the Court to make in any proceeding under this Act adequate provision with respect to properties presented at or about the time of the marriage which may belong jointly to both the husband and wife. The application may be made before the close of the proceedings and the order may be made at the time of passing the decree or liberty may be given to the parties to apply for an order of disposal of the properties in the proceeding on any subsequent date. The words "at or about the time of the marriage" practically determine the scope of the jurisdiction of the matrimonial Court with reference to making orders for disposal of the properties. Firstly, the properties must have been presented at or about the time of the marriage, *M.D. Krishnan v. M.G. Padma*⁹⁴⁹ and secondly, the properties must belong jointly to both husband and wife. It is a vexed question not capable of easy or certain answer whether a property or a present made at the time of the marriage belongs to both the spouses or to one of them and if so to which of them. The answer must relate to the custom and usages and the consciousness of the community in respect of such matters. There are certain presents which are made only to the bride, certain others which are made only to the bridegroom, and still others which are intended for the benefit of both the parties. Whether a particular present belongs to this or that or other category, has to be decided by the matrimonial Court. The expression "may belong jointly to both the husband and the wife" shows that the Court has power to decide whether the properties belong jointly to both or to only one of them. If the intention of the Legislature were merely that the Court has power to provide under this section with respect to only properties which are admitted by both the parties to belong to them jointly the expression "may belong" would not be appropriate, the proper words being "belongs jointly to both the

(944) 1960 Punj 326.

(945) *Baboolal v. Prem Lata*, 1974 Raj 93.

(946) *Appa Rao v. Peradassamma*, (1974) 2 An. W.R. 359; (1974) 2 A.F.L.J. 159. See also *Dr. Thimmappa v. Nagawad*, 1976 Karn. 215.

(947) *Patel Dharmaji Pranjli v. Bai Sakar Kanji*, 8 Guj. L.R. 888; 1966 Guj. 150.

(948) *Ashish v. D.G. Tewari*, 1970 Delhi 98, 101.

(949) 1968 Mys. 226.

husband and the wife". Even when the Court does find that a particular property does not belong to both the parties, but only to one of them, it has jurisdiction to embody any provision in the decree with respect to such separate property. Section 27 does not exclude the jurisdiction or the power of the Court to pass an appropriate decree in regard to the property which may belong either solely to the husband or solely to the wife. This power is inherent in the legal proceedings which appropriately arise under the Hindu Marriage Act. The section does not exclude the general power of the Court to pass an appropriate decree in regard to the property belonging exclusively to either the husband or the wife.⁸⁰⁰ Since in view of Section 21 all powers of a civil Court, subject to the special provisions of the Hindu Marriage Act are available in dealing with the proceedings under the Act, by virtue of of Section 151 and Order 7, rule 7 of the Code of Civil Procedure the Court has power to pass a decree directing the husband to return to the wife her ornaments and other articles.⁸⁰¹

*(28. Appeals from decrees and orders.—(1) All decrees made by the Court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the Court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in the exercise of its original civil jurisdiction.

(2) Orders made by the Court in any proceeding under this Act, under Section 25 or section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order]

Section 28.—Synopsis.

1. Scope of the section.

3. Limitation

2. Forum of appeal.

1. *Scope of the section.*—Section 28 (1) provides that all decrees passed by the Court in any proceeding under the Act are appealable to the Court to which an appeal lies from the decisions of the Court in the exercise of its original civil jurisdiction. No appeal will however lie on the subject of costs only by reason of Section 28 (3). The provision for filing a second appeal even after the substitution of Section 28 by Act LXVIII of 1976 continues to be Section 100, Civil Procedure Code and a second appeal will lie only on the grounds provided for in that section.⁸⁰²

In a proceeding under the Hindu Marriage Act the Court may have to pass orders other than under Sections 24, 25 and 26⁸⁰³ The provision regarding appeals from orders in Section 28 (2) is confined to only orders of a permanent nature under Sections 25 and 26.

⁸⁰⁰Substituted by Act LXVIII of 1976, s. 18.

(800) *Kampan Prasad v. Om Wali*, 1971 All L.J. 1150; 1972 All 153.

(801) *Ibid.*

(802) *Indraj v. Shanti*, 1976 All 275.

(803) *Devi Narajo v. Ramu*, 1975 All 94.

So with respect to interim orders or any order other than one of a permanent nature under Sections 25 and 26 there is no appeal.

No appeal, is contemplated under the amended law against an order under Section 24 of the Act. What has not been expressly included in the new section must be implied to have been excluded. Therefore no appeal lies now against an order under section 24.⁹⁵⁴

The plain language of the provisions of Section 19 of the Marriage Laws (Amendment Act (LXVIII of 1976) clearly shows that an appeal now lies only against three kinds of orders under the Act, namely (i) where a decree is passed; (ii) where a final order is made in respect of permanent alimony under Section 25 or (iii) for the custody of minor children under Section 26. The right of appeal is not an inherent right, but is a statutory right which can be conferred only by law enacted by a competent Legislature. The right of appeal having been restricted by Section 19 of the Amending Act, the right originally residing in any person aggrieved by an order under Section 24 of the Act to prefer an appeal against the same has now been taken away.⁹⁵⁵ Prior to the substitution of the present Section 28 some decisions had held that a revision from an interlocutory order under the Act was competent under Section 115, Civil Procedure Code. But in view of the insertion of a proviso to Section 115 by the Civil Procedure Code (Amendment) Act of 1976, such revision is no longer competent. It may be that under Article 227 of the Constitution a Court may, in special circumstances interfere.

Section 28 only indicates what can be appealed against but not who can appeal. This would be a matter governed by general principles.⁹⁵⁶

The amended provisions of the Act apply to pending appeals by reason of Section 39 of the Marriage Laws (Amendment) Act, 1976.⁹⁵⁷

A second appeal against an appellate order to the High Court is maintainable.⁹⁵⁸

2. **Forum of appeal.**—The forum of appeal depends on the law for the time being in force in that respect.⁹⁵⁹ Where the decree is of the Court of a civil Judge senior division, which Court had been notified by the Government under Section 3 (b) as having jurisdiction in respect of matters under the Hindu Marriage Act, appeal from such decree lies to the District Court.⁹⁶⁰ In the absence of any such notification, where a petition under the Act is decided by the Additional District Judge who forms part of the District Court, appeal from his decision will lie to the High Court.⁹⁶¹ Reading Section 28 of the Hindu Marriage Act

(954) *Narain Singh v. Rahmani*, 1977 H. P. 93; *Gurjakh Singh v. Tarangjit*, 1977 H.P. 66.

(955) *Satish Bhandra v. Surjit Singh Bhandra*, 79 Punj. L.R. 384; 1977 P. & H. 303.

(956) *Tara Singh v. Shaktangula*, 1974 Raj. 21.

(957) *Sunderi Devi v. Bando Lal*, 1977 Cal. 189; *Radhakrishnan v. Lakshmi Bai*, 1977 H.P. 271.

(958) *Gurcharan Singh Kaur v. Sardar Swarna Singh*, 1978 All. L.J. 284.

(959) *Gubi v. Pandalik*, 1960 Bom. 521; *Mallappa v. Mallana*, 1960 Mys. 232; *Gangadhar v. Mangala*, 1960 Bom. 42; *Kalameti v. Dori Ram*, 1961 H.P. 7.

(960) *Vellamangal v. Periamangal*, 1966 Mad. 510; *Dhaleppa v. Krishnakshi*, 1962 Mys. 172; *Mallappa v. Mallana*, supra; *Gangadhar v. Mangala*, supra. See also *Rajen Singh v. Tej Kumar*, 1961 Punj. 460; *Harid v. Lilavati*, 1961 Guj. 292.

(961) *Amli v. Pandalik*, supra.

and section 15 of the Madras City Civil Court Act together, it is clear that if a petition under the Marriage Act had been disposed of either by the principal judge of the City Civil Court or by the Additional Judge of that Court, an appeal will lie straightaway to the High Court; if however it is disposed of by an Assistant Judge of the Court an appeal will lie only to the principal Judge.⁹⁶²

The finding of fact arrived at by the first Court after appreciation of the evidence should be reversed only when the evidence taken as a whole cannot reasonably justify the conclusions arrived at or when there is an element of improbability arising from proved circumstances which in the opinion of the Court outweighs such finding.⁹⁶³ The scope of interference, according to the Supreme Court is as follows: "If in giving the finding the Court ignores such an important piece of evidence, and other pieces of evidence which are equally important are shown to have been misread and misconstrued and thus Court comes to the conclusion that on the evidence taken as a whole no tribunal could properly as a matter of legitimate inference arrive at the conclusion that it has, interference by this Court will be called for".⁹⁶⁴

But where the question is not of credibility of witnesses based entirely on the demeanour but a question of inference from facts, the Court of appeal is in as good a position as the trial Court and is free to reverse its finding if it thinks that the inference made by the trial judge is not justified. *Kowthalya v. Wasakha Ram* ⁹⁶⁵ and *Radha Prasad v. Gajadhar*.⁹⁶⁶

The scope of an appeal under this section is the same as under the Civil Procedure Code and hence in a second appeal there can be no interference with findings of fact: *Jwalsai v. Ningappa*.⁹⁶⁷

An appeal from an adjudication under Sections 9, 10, 11 or 13 of the Act should be treated as a Civil Miscellaneous Appeal and not as a regular appeal under section 96 of the Civil Procedure Code. Though such adjudication is regarded as a decree, it is only for the purpose of the particular section above-mentioned and having been given in a proceeding not started with the presentation of a plaint it cannot be regarded as a decree for the purpose of Section 96, Civil Procedure Code: *Varalakshmi v. Veerreddy*.⁹⁶⁸

Puthala v. Manoharan ⁹⁶⁹ holds that where an *ex parte* order of nullity of marriage was passed it was subject to the result either of an application to set it aside or, an appeal preferred against it and a marriage contracted after the *ex parte* decree would not be valid if the *ex parte* decree was subsequently set aside: See also *Chandra Mohini v. Abinash Prasad* ⁹⁷⁰ The reasoning for the contrary view contained in *Mohan Murari v. Kusum Kuma*,⁹⁷¹ is not

(962) *Balraj Singh v. Raj Kumari*, (1972) 2 M.L.J. 53 85 L.W. 16; 1972 Mad. 278.

(963) *Gurnam Kaur v. Navinder*, 80 Punj L.R. 507.

(964) *Ernest J. White v. Kathleen O. White* 1958 S.C.J. 839.

(965) 1951 Punj. 521.

(966) 1980 S.C. 115.

(967) 1969 Mys. 3.

(968) 1961 A.P. 359.

(969) 1968 Mad. 403.

(970) 1967 S.C. 581.

(971) 1969 M.P. 194.

correct either in principle or authority and must be held to have been overruled by the decision of the Supreme Court in *Chandra Mohini's case*.⁹⁷²

An appeal under section 15 of the Letters Patent is maintainable under section 28 against the decision of a single judge of the High Court on appeal from the decree of the City Civil Court, *Madras Viru Reddi v. Kistammal*.⁹⁷³

3. **Limitation.**—Section 28 (4) provides a period of limitation of thirty days for an appeal from the date of the decree or order. Appeals from decrees and orders under the Act are not excluded from the operation of the Limitation Act.⁹⁷⁴ The limitation of thirty days in Section 28 (4) as it now stands is applicable only to first appeals.⁹⁷⁵ The limitation for a second appeal would be the same as for any other second appeal, namely ninety days.⁹⁷⁶ Though the Marriage Laws (Amendment) Act, 1976 curtails the period for filing an appeal, the applicability of Section 5 of the Limitation Act to appeals under Section 28 is not excluded.⁹⁷⁷ In calculating the limitation period of thirty days for an appeal under the Hindu Marriage Act the appellant will be entitled to exclude the period spent in obtaining a copy of the decree.⁹⁷⁸ If the purpose of section 28 (4) was to stop time running in case a copy of the decree was not supplied free of cost as contemplated in Section 23 (4) the legislature would have expressly provided for the same in Section 28 (4). If the concerned party does not ask for a copy of the divorce decree as contemplated in Section 23 (4) the non-furnishing of the same free of cost by the Court does not save the party from the applicability of the law of limitation prescribed for filing the appeal under Section 28 (4) within a period of thirty days from the date of the decree of divorce.⁹⁷⁹

*[28-A. **Enforcement of decrees and orders.**—All decrees and orders made by the Court in any proceeding under this Act shall be enforced in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction for the time being are enforced].

NOTES

A decree for restitution of conjugal rights may be executed under Order 21, rules 32 and 33, Civil Procedure Code. Orders under Sections 24 and 25 may be executed under Order 21, rule 30 of the Code.

An order granting alimony *pendente lite* can not only be executed by the wife, but when the payments are made a condition precedent for the taking up of the trial of the petition or of the hearing of the appeal, and the order is not complied with, the petition or the appeal may be dismissed.⁹⁸⁰

(972) 1965 M.P. 194

(973) 1969 Mad. 235; 81 L.W. 490

(974) *Chander Dev v. Rani Bala*, 1979 Delhi 23.

(975) *Indraj v. Shanti*, 1978 All. 279, *Surjit Kaur v. Tarzan Singh*, (1977) 79 Punj. L.R. 667.

(976) *Indraj v. Shanti*, *supra*.

(977) *Kamtesh v. Kamal Singh*, 1978 M.P. 245.

(978) *Chander Dev v. Rani Bala*, *supra*.

(979) *Surjit Kaur v. Tarzan Singh*, *supra*.

(980) *Mahalingam Pillai v. Annamallai*, (1956) 2 M.L.J. 289.

* Substituted by Act LXVIII of 1976, S. 19.

Where an order is made under Section 24 for expenses and maintenance, the fact that the main petition itself is withdrawn by the person against whom that order was made would not bar the enforcement of that order by execution *Krishnan v. Thailambal* ⁹⁸¹

Where the husband is directed to pay maintenance to the wife under Section 24 and the maintenance falls into arrears, the Court can enforce obedience to that order by stopping further proceedings started by the husband *Ramachandra v. Kausalya*.⁹⁸²

SAVINGS AND REPEALS

29 Savings.—(1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different religions, castes or sub-divisions of the same caste

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 (XLIII of 1954) with respect to marriages between Hindus solemnized under that Act whether before or after the commencement of this Act

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This section contains the savings in respect of some matters which otherwise would require a different conclusion. The first saving is that a marriage solemnized between persons belonging to the same *gotra* or *pravara* or belonging to different religions, castes, or sub-divisions of the same caste, which was solemnized before the commencement of this Act, if otherwise valid, should not be considered invalid. The Hindu Marriage Disabilities Removal Act, 1946, section 3 had laid down already that no text, rule or interpretation of Hindu law or any custom or usage would render a marriage between two Hindus which was otherwise valid to be invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara*, or to different sub-divisions of the same caste. But even after this Act Hindus belonging to different castes could not marry under Hindu law. A further legislation had therefore to be enacted. Accordingly the Hindu Marriages Validity Act, 1949 was passed providing that notwithstanding anything contained in any other law for the time being in force or in any text, rule or interpretation of Hindu law or in any custom or usage or Hindu marriage which was otherwise valid shall be invalid or deemed ever to have been invalid by reason only of the fact that the parties belonged to different religions, castes or sub-castes. Both the above Acts have now been repealed and Section 29 (1) has reproduced the provisions

(981) (1969) 1 M.L.J. 326; 62 L.W. 58

(982) 1969 Mys. 76.

of those Acts. The provisions of this sub-section are applicable with retrospective effect.⁹⁸⁵ The second saving is of any right recognised by custom⁹⁸⁶ or conferred by any special enactment,⁹⁸⁷ which has not been repealed by section 30 to obtain the dissolution of a marriage, whether it is solemnised before or after the commencement of the Act. It might thus be possible in some cases for the parties to have three modes of dissolution of marriage.⁹⁸⁸

Section 29 (2) saves the right of dissolution of marriage recognised by any custom or conferred by any special enactment as for instance the Travancore Nayar Act which has not been repealed by Section 30 of this Act. This does not mean that a Hindu marriage governed by the Nayar Act cannot be dissolved under Section 13 of the Hindu Marriage Act and that resort should be had only to the provisions of the Nayar Act. The fact that an existing right has been saved in a new enactment does not by itself mean that a right conferred by the new enactment is unavailable to a party entitled to the benefit of the saving. *Chellappan v. Madhavi* ⁹⁸⁹

Such a custom not being abrogated it is open to the parties governed by this Act to still adhere to these customary forms of divorce instead of resorting to the Court under the provisions of this enactment. *Ase Lachiah v. Ase Rajamillu*⁹⁹⁰, *Bai Jirabai v. Milkaram*⁹⁹¹ In addition to these customary forms of divorce, there are also certain statutes conferring the right on the spouses to have the marriage dissolved under the provisions of those statutes. Even though these statutes have been repealed by the next section as unnecessary in view of the comprehensiveness of the provisions of this enactment, a proceeding already commenced under such a repealed statute may be continued, conducted and decided under such a statute. If no proceeding under the statute repealed by this Act was pending on the date of the Act, a right to divorce given by the repealed statute on the ground of desertion for a particular period cannot be availed of by a petition after its repeal by the present Act. Section 29 (2) excepts customary divorces and divorces available under the statutes not repealed by Section 30 *Sutabai v. Ramchandra* ⁹⁹² *Vasoppan v. Saradha*,⁹⁹³ *Balwant Singh v. Balwant Kaur*,⁹⁹⁴ *Ethirajamma v. Venkatacharya*⁹⁹⁵, (pending proceeding under a repealed Act can be continued). The Travancore Ezhava Act of 1900 is a special enactment coming within the scope of Section 29 (2).⁹⁹⁶ The right to obtain dissolution on a petition under Section 15 of the Cochin

(985) *Kasim Doss v. Chiranjee Lal*, 1960 All 446.

(986) *Kamala Nair v. Narayana Pillai*, 1958 Bom 12, *Edamma v. Hussainappa*, 1965 A.P. 455.

(987) *Sutabai v. Ramchandra*, 1958 Bom. 116.

(988) *Chellappan v. Madhavi*, 1961 Ker. 311; I.L.R. (1961) 1 Ker. 35.

(989) *Ibid.*

(990) (1963) 1 An. W.R. 295

(991) 1961 (2) Cr. L.J. 469.

(992) 1958 B. 116 (F.B.) 39 Bom. L.R. 885.

(993) 1958 Ker. 39 (F.B.).

(994) 1957 Pepsu 1.

(995) (1956, 2 M.L.J. 73; 69 L.W. 283.

Nair Act is also saved by Section 29 (2).⁴⁴ The provisions as to dissolution of marriage contained in the Madras Aliyassanthana Act are not affected by the Hindu Marriage Act. The said right exists and continues to be available to parties governed by the former Act.⁴⁵

Where an order of dissolution of marriage had not been passed prior to the repeal of the Travancore Nair Act such an order cannot be passed thereafter except in accordance and conformity with the provisions of the Hindu Marriage Act, 1955, be it that the matter is pending in the Court of first instance or the appellate Court or revisional Court.⁴⁶ The third saving saves all proceedings under the previous law for declaring any marriage as null and void or for annulling or dissolving any marriage or for decree for judicial separation pending at the commencement of this Act, and says that any such proceeding may be continued and determined as if this Act, has not been passed. The fourth and the last saving is with respect to marriages between Hindus solemnised under the Special Marriage Act of 1954 and says that those marriages, whether solemnised before or after the commencement of this Act, shall be governed only by that Act.

30. Repeals.—The Hindu Marriages Disabilities Removal Act, 1946 (XXVIII of 1946), the Hindu Marriages Validity Act, 1949 (XXI of 1949), the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 (Bombay Act XXV of 1946), the Bombay Hindu Divorce Act, 1947 (Bombay Act XXII of 1947), the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 (Madras Act VI of 1949), the Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950 (Saurashtra Act V of 1950), and the Saurashtra Hindu Divorce Act, 1952 (Saurashtra Act XXX of 1952), are hereby repealed.

NOTES

1. Repeals.—The section mentions the Acts which have been repealed as unnecessary in view of the comprehensive provisions of this enactment. But if proceedings had been started prior to this Act under any of the repealed enactments those proceedings are under Section 29, as already seen.

Section 30 has been repealed by the Repealing and Amendment Act, 1960 (LVIII of 1960).

⁴⁴ (1954) *Andhra v. Andhra Pradesh*, 1977 Ker. L.T. 899.

⁴⁵ (1988) *Prem v. Amma Shetty*, (1973) 1 Mys. L.J. 7, 1973 Mys. 69.

⁴⁶ (1988) *Madhavan Nair v. Raghavayy*, 1979 Ker. L.T. 61. Cf., *Krishna Pillai v. Sujada Amma*, 1971 Ker. 44 (F.S.) *Madhavan Nair v. Raghavayy*, 1976 Ker. 71.

THE HINDU MINORITY AND GUARDIANSHIP ACT (XXXII OF 1956)

New Delhi the 27th August, 1956.

The following Act of Parliament received the assent of the President on the 25th August, 1956 and is hereby published for general information:

An Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus.

Enacted by Parliament in the Seventh Year of the Republic of India as follows:

1. Short title and extent.—(1) This Act may be called **THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956.**

2. It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

NOTES

Scope.—The preamble makes it clear that this is an enactment undertaken to amend and codify certain parts of the law relating to minority and guardianship among Hindus. This is not a complete code with reference to the entire law of minority and guardianship amongst the Hindus. Its provisions mainly intend to crystallise in a statutory form who are the persons entitled to act as natural and testamentary guardians of Hindu minors and also to impose upon their powers certain restrictions.¹ With reference to those matters which are enacted upon expressly by this Act, this prevails, and any incident of Hindu Law to contrary or any provision of the general Act governing minors, namely, the Guardians and Wards Act, to the extent it is inconsistent with the enacted provisions of this Act stands abrogated. But in the wide field still left untraversed by the provisions of this enactment, the incidence of the old Hindu Law as it obtained prior to the enactment of this Act as well as the provisions of the Guardians and Wards Act which is a more comprehensive legislation governing minors and guardians generally, will apply.² It is rather difficult to see why the Legislature did not enact, by a simple and single provision, that the law governing the Hindus with reference to minority and guardianship will be the law enacted in the general Act, the Guardians and Wards Act, because it is difficult to see any improvement in this Act over the provisions of the general Act.

3. Act to be supplemental to Act VIII of 1899.—The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1899.

NOTES

This section says expressly that the provisions of this Act, shall be in addition to and not, save as hereinafter provided, in derogation of the Guardians and Wards Act, 1899. This

(1) *Rej Kumar Mohan v. Innes Kumbhar*, 1972 M.P.L.J. 775.

(2) *Ibid.*

is what we have already indicated in the discussion under Section 1. Under the express words of this section the provisions of this Act are merely supplementary to the provisions of the Guardians and Wards Act of 1890 and do not derogate from the provisions of the latter Act except when such derogation is expressly provided for.³ The provisions of this Act and of the Guardians and Wards Act are complementary. In case of repugnancy the former Act would prevail.⁴ The need for this Act seems to be the provision, in the general Act excepting the personal law governing the parties.

In view of the provisions of Section 2, the persons falling under the definition of the word 'guardian' in Section 4 (2) of the Guardians and Wards Act which does not restrict its meaning to the person either appointed as a guardian or declared as such by the Court, the Court can pass an order against a *de facto* guardian also under the provisions of Section 41 (3) of the latter Act. Merely because a *de facto* guardian is not expressly included in the definition of guardian in Section 4 (b) of the Hindu Minority and Guardianship Act, that does not prevent the operation of Section 41 of the Guardians and Wards Act against a *de facto* guardian.⁵

3. Application of Act.—(1) This Act applies—

- (a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;
- (b) to any person who is a Buddhist, Jain or Sikh by religion; and
- (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jains or Sikhs by religion as the case may be:

- (i) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion;
- (ii) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jain or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and
- (iii) any person who is a convert or re-convert to the Hindu, Buddhist, Jain or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of Clause 25 of

(3) *Raj Kumar Mishra v. Indra Kumar*, 1972 M.P.L.J. 775; *Datta v. Prithvi Raj*, (1973) 75 Punj. L.R. (D.) 513; *Sarjit Singh v. Nazir Singh*, (1970) 72 Punj. L.R. 87; *Ram v. Dima*, 1976 Bom. 190; *Kandehyal v. Sundyal*, 1961 M.P.L.J. Notes. 69 Ss; also *M. Puthucherry v. Lakshminarayana*, (1970) 1 An. W.R. 512, 515; (1970) 1 A.P.L.J. 47.

(4) *Kato Parida v. Santhosh Adalik*, I.L.R. (1965) Cal. 839; 1976 Orissa 60.

Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

NOTES

Regarding the applicability of this Act since its applicability is enacted in the same language as the Hindu Succession Act and the Hindu Marriage Act, the commentaries thereunder may be referred to and hence no separate discussion of that question is called for here.

4. Definitions.—In this Act,—

- (a) "minor" means a person who has not completed the age of eighteen years,
- (b) "guardian", means a person having the care of the person of a minor or of his property or of both his person and property, and includes—
 - (i) a natural guardian,
 - (ii) a guardian appointed by the will of the minor's father or mother
 - (iii) a guardian appointed or declared by a Court, and
 - (iv) a person empowered to act as such by or under any enactment relating to any Court of Wards
- (c) "natural guardian" means any of the guardians mentioned in Section 6

Section 4—Synopsis

1. Minority

2. Guardian

1. **Minority** —Minor is defined here as a person who has not completed the age of 18 years. Contrasting this definition with the definition of a minor under the Indian Majority Act, it will be found that the definitions are not identical. Under the Indian Majority Act if the minor is the ward of a guardian appointed by the Court or is a ward under the Court of Wards Act the attainment of majority is fixed at the completion of 21 years and not on the completion of 18 years as provided for in Section 4 (a) of this Act. When there is a difference between the enactment in this Act and any other provision, it is this provision that must prevail both because this is a later provision dealing with the same subject of minority and also because to the extent of that subject as applicable to the Hindus this is a codification in the sense of a complete enunciation of the law. So where there is a guardian appointed for a Hindu minor by Court or even when a Hindu minor is a ward of a Court of Wards, the minority may be held to terminate with the completion of 18 years and not with the completion of 21 years as provided for in the other enactment. The only other way of reconciling this definition of a minor as a person who has not completed the age of 18 years is to construe it as merely indicating that up to the completion of 18 years he is a minor but not that he is not a minor even after that age if there is some other statute which prolongs the age of minority. There is no doubt that the words of the definition in Section 4 (a) give room for such contention; and since Section 2 expressly says that this Act is not in derogation of the Guardians and Wards Act it is possible to read both the definition here and the definition in the Guardians and Wards Act regarding minority as meaning that a minor ceases to be a minor ordinarily on completion of 18 years but if he has a guardian appointed under the

Guardians and Wards Act or is a ward under the Court of Wards Act the age of minority is extended upto 21 years. This is also the effect of Section 4 of the Majority Act which in this respect overrides all other enactments to the contrary effect. *Swaminathan v. Angiyarkanni Ammal*.⁶ As against this construction, the overriding effect of Section 5 of this Act may be urged

2. **Guardian.**—The guardian is defined under Section 4 (b) of this Act as one having the care of the person or property or both of a minor and includes a natural guardian, a testamentary guardian, a guardian appointed or declared by a Court and a person empowered to act as such under the Court of Wards Act. Natural guardian is one mentioned in Section 6, namely, the father or the mother including the adoptive father and the adoptive mother, the mother in the case of an illegitimate child and after her the father, and the husband in the case a married girl. It will be noticed that a *de facto* guardian who has figured largely in the administration of Hindu Law prior to the enactment of this Act is not one of the persons mentioned in the definition of guardian. He is separately dealt with under section 11 which says that after the commencement of this Act no person shall be entitled to dispose of or deal with the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor. In the context of Section 4 the word "includes" in clause (b) is used only to enumerate the different classes of persons coming within the definition. After the Act a person cannot claim to be the legal guardian of a Hindu minor unless he or she falls within the four classes of persons enumerated in Section 4 (b).⁷ In law there is nothing like a *de facto* guardian. The Act is limited to guardians in respect of the minor's person or his property other than his undivided interest in joint family property whether they be natural guardians or testamentary guardians or guardians appointed by the Court.⁸ The position of a natural guardian, a testamentary guardian and a guardian appointed or declared by a Court has already been considered in the chapter on minority and guardianship in the main body of the book. When we come later on to consider the powers of such guardians both under the Hindu Law and under the relevant sections of this enactment, we will find that there has been a good deal of restriction by this Act upon the powers exercised by the natural and testamentary guardians under the Hindu Law. With reference to a guardian appointed or declared by a Court, reference may usefully be made to the provisions of the Guardians and Wards Act as regards both his position and powers. A next friend need not necessarily be any of the guardians enumerated in Section 4. The powers of a person accepted by the Court either as a next friend or as a *guardian-ad litem* of the minor are only limited to that legal proceeding and not beyond that.⁹ With reference to the powers of the Court of Wards regarding a ward of Court the provisions of the Court of Wards Act may usefully be referred to as regards the position and powers of the Court of Wards.

5. **Overriding effect of Act**—Save as otherwise expressly provided in this Act,—

- (a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall

(6) (1963) 2 M.L.J. 229; 1964 Mad. 11.

(7) *Rameswamiyer Iyer v. Angiyarkanni Ammal*, I.L.R. (1963) 1 Ker 656; 1964 Ker. 269. See *Chitra Ratan v. Dhanu*, 1978 Bom. 150.

(8) *Krishnakumar Adigunjal, In re*, 1964 Gaj. 68.

(9) *Nanda Singh v. Suresh Kumar*, 1968 Pat. 518.

cease to have effect with respect to any matter for which provision is made in this Act;

- (b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

NOTES

This only gives the overriding effect of this Act and provides that any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act and that any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act. This section merely emphasises what has been already adverted to namely, there is a good deal of restriction on and contraction of the powers and privileges enjoyed by the natural guardians and the testamentary guardians prior to the enactment of this legislation under this Act and that if there is any provision in this Act which is inconsistent with any existing enactment or rule of law or custom the provision in this Act prevails over them.¹⁰ As regards the question whether the age of majority provided for as completion of 18 years is postponed till the completion of 21 years in the case of a minor for whom a guardian has been appointed or declared by a Court or who is under the superintendence of a Court of Wards as provided for under Section 4 of Indian Majority Act, the position is not free from doubt and difficulty. Section 4 of the Majority Act overrides expressly all other enactments, and Section 5 of this Act overrides all other enactments with equal explicitness. It is however, surmised that this enactment being a later one and confined to a specific community must be held to prevail over the Majority Act. But see *Swaminathan v. Angaiyarkonni*.¹¹

6. Natural guardians of a Hindu minor—The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

- (a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
- (b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother and after her, the father,
- (c) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

- (a) if he has ceased to be a Hindu, or
- (b) if he has completely and finally renounced the world by becoming a hermit (*paraprastha*) or an ascetic (*yati* or *sanyasi*).

(10) See *Duraimony Naicker v. Balasubramanian*, (1977) 2 M.L.J. 92, 1977 Mad. 304, *Kannur Parida v. Balasubramanian*, 1966 Orissa 60. [In case of conflict between this Act and the G. and W. Act, the former prevails. But see *Asha v. Pritam Raj*, (1973) 75 P.L.R. (D.)-313 (Overriding effect of Section 5 would not seem to apply to provisions of the G. & W. Act)]

(11) (1963) 1 M.L.J. 229.

Explanation.—In this section, the expression 'father and mother' do not include a step-father and a step-mother.

Section 6—Synopsis.

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|--------------------------------------|--|
| 1. General. | 3. Conversion of the Natural Guardian. |
| 1-A. Custody of Minor's Property. | 4. Renunciation of the world. |
| 2. Custody of the Person of a minor. | 5. Step-father and Step-mother |

1. **General.**—After the passing of this Act the question as to who is the natural guardian has to be determined as per the provisions of the Act and not according to Hindu law before it was codified.¹² This section provides for natural guardianship of a Hindu minor. If the minor is a boy, the natural guardians are first the father and then the mother and nobody else. If the minor is an unmarried girl, even then the father comes in as the first natural guardian and only after him the mother. If the minor girl gets married, the husband becomes her natural guardian. The guardianship here means not only the guardianship of the person of the minor but also the separate property of the minor. If the minor has not completed 5 years of age, the custody of the minor shall ordinarily be with the mother. The substantive right conferred on the mother to the custody of the minor under Section 6 (a) is not subject to any limitation as the one imposed under Section 26 of the Hindu Marriage Act that a proceeding between the spouses should be pending before an application can be made by the mother for the custody of the minor under Section 6 (a).¹³ In the case of an illegitimate child, be it a boy or a girl, the mother becomes the first natural guardian and only after her the father.¹⁴ No doubt if the illegitimate minor girl gets married, her husband becomes her guardian both of her person and her property. There is a proviso to the section which disables a person from acting as a natural guardian if he has ceased to be a Hindu or has completely and finally renounced the world by becoming a hermit or an ascetic. The mother cannot represent a child who has completed five years of age in a suit against the father unless the father has been declared to be incompetent by a Court of law.¹⁵ The *explanation* to the section says that the father and mother do not include a step-father and a step-mother. It will be seen that there is no provision in this section for the natural guardianship of an adopted boy or an adopted girl, since by adoption the boy or girl passes on to the family of the adoptive parent from the family of the natural parents. It is the adoptive father and after him the adoptive mother that will be the natural guardian of an adopted child. This is provided for in the next section, namely, Section 7.

As long as the father is alive the mother cannot be the natural guardian of the minor and even if the father refuses to act as the natural guardian or neglects to discharge the obligations as a natural guardian, any other person and more so the mother can have recourse to legal proceedings and obtain powers to act as the minor's guardian, *Narain Singh v. Saparna Kuer*.¹⁶

A mother living separately from the father for ever twenty years and managing the affairs of their minor daughter who was under her care and protection can be considered to

(12) *Santha Kumari v. Natarajan*, (1973) 2 M.L.J. 286; 86 L.W. 487.

(13) *Asha v. Prithoi Raj*, (1973) 75 P.L.R. (D.) 313.

(14) *Rajalakshmi v. Minor Ramachandran*, (1966) 2 M.L.J. 420. [The guardianship covers both the person and the property of the minor.]

(15) *Sekha Devi v. Bhima*, 1974 (1) C.W.R. 556.

(16) 1968 Pat. 313. Cf., however *Susala v. Shanmugalaksh*, (1976) 1 An. W.R. 423.

be the natural guardian of the minor, though normally, when the father is alive he is the natural guardian¹⁷. Under Section 6 (a) the father is the guardian whether or not he is divorced from the mother.¹⁸ But where the parents of the minor had been divorced and the minor was the only daughter of the parents and the only child of the mother the mother was declared entitled to the guardianship and custody of the minor as against the minor's father applying the principle that the minor's welfare is the paramount consideration in such cases.¹⁹

The father of a Hindu minor being the natural guardian under the personal law applicable to the minor did not require the support of any order of any Court under the provisions of the Guardians and Wards Act. The position has been further strengthened after the passing of the Hindu Minority and Guardianship Act, since the statutory declaration in Section 6 of the Act declaring the father as the natural guardian of both the person and the property of the minor son will inevitably lead to the conclusion that an application by the father for appointing him or declaring him as the guardian of his minor son under the provisions of the Guardians and Wards Act will not lie.²⁰

1-A. Custody of Minor's Property.—The property of which the natural guardian, namely the father and after him the mother is entitled to be in possession on behalf of a minor, is the separate or the absolute property of the minor and not the interest of the minor in joint family property. The expression "her undivided interest in the joint family property" in the opening paragraph of this section shows that there can be a girl who may possess an undivided interest in joint family property. Joint family property as used in this section does not mean the technical coparcenary property of the Mitakshara school, because no female can be a member of such a coparcenary. Obviously her undivided interest in joint family property in this section must refer to the interest which a minor girl gets by reason of succession to the interest of a deceased coparcener. For instance, if a coparcenary consists of father and son and the son dies leaving a minor widow, the minor widow's interest in the family property will be such an interest and the father-in-law cannot be a natural guardian in respect of the interest. Such an undivided interest in the joint family property will be held by her as a member of the joint family and her father or mother cannot be her guardian in respect of that interest for more reasons than one. First of all, that is not her absolute or separate property contemplated under this section so as to let in her father or mother as her guardian in respect of such interest. Secondly she being a married girl the natural guardianship of the father and the mother cannot be postulated under this section. In respect of her undivided interest in joint family property in which her father-in-law also owns an interest he will be the manager of the property and the applicability of this section to such property cannot arise. So also if the joint family consists of a father and several sons and the widow of a predeceased son having an interest in the undivided property of the joint

(17) *Jijabai v. Pathankar*, (1971) 2 S.C.J. 17, 1971 S.C. 315. Cf., *Ranganatha Gounder v. Kuppusami Naidu*, (1977) 2 M.L.J. 128. [Even if the minor children were living with her, she could be termed only as a *de facto* guardian.]

(18) *Kamalaksha v. Bhaskara Menon*, 1961 Ker. 154. [S. 6 overrides the contrary provision in Section 10 (2) of the Travancore Nayar Act of 1100.]

(19) *Smt. Mahila v. Vyander Kumar*, 1976 S.C. 1359.

(20) *Dakshinamurti Mudaliar*, In re, (1969) 1 M.L.J. 345, 347; 81 L.W. 590.

family, there can be no question of a guardian in respect of her interest in the family property because the father or some other adult son of the family will be the manager of the entire property including the interest of the widowed daughter-in-law. This section when it talks of the custody of a minor's property deals only with the custody of the property which belongs exclusively to the minor whether a girl or a boy and not an undivided interest of such minor in joint family property. When a Hindu father dies leaving sons and minor daughters who are also entitled to inherit jointly with the sons to the father's property under the Hindu Succession Act of 1956, the interest of the minor daughters in the property left by the father, whether that property is the father's separate property or the father's interest in the joint family property, will be the undivided interest in the joint family property and this section therefore cannot apply.

The mother is the natural guardian of the property and person of a minor under the section (after the father). Her remarriage by itself does not operate as a disqualification. *Bakshi Ram Ladhu Ram v. Mst. Shanta Devi*.²¹

2. **Custody of the person of a Minor.**—Normally the natural guardian is entitled to the custody of the minor. The father has the natural right he being the natural guardian of the minor.²² But that is no reason for holding that the welfare of the minor cannot be taken into account in the matter of deciding the question of custody.²³ The dominant factor, in fact to be considered in deciding the question of custody of a minor child is the welfare of the minor.²⁴ Orders as to the custody of a child are always of a temporary nature and those interested in the minor are at liberty to apply to the Court.²⁵ Where a person claims custody in preference to the natural guardian, a heavy burden is cast on such person to show that the welfare of the minor demands that custody should be with him.²⁶ In the absence of any finding that the natural guardian was not a suitable person to have the custody of minor girls aged 13 and 7 it was held that the wishes of the girls would make no difference and an order deciding that the natural guardian should have the custody was not wrong;²⁷ under the Act till the age of 5 is completed the custody of the minor whether a boy or a girl shall ordinarily be with the mother. The expression *ordinarily* used in Section 6 (a) is significant. It is just possible that the mother may be immoral or might have been divorced from the father and there may be other circumstances which would induce the Court in the interest of the minor to take the minor away from the custody of the mother and give it either to the custody of the father or to somebody else. But in the absence of any such circumstance disqualifying the mother to have the custody of the minor's person the father cannot claim such custody. The natural mother's custody of her child under five years of

(21) 1950 Punj. 304; *Kus Parida v. Beishnas Malhi*, I.L.R. (1965) Cut. 839; 1966 Oriss. 60; *Anand Singh v. Gurnam Kaur*, 1969 Cur. L.J. 672 (Punj.).

(22) *C.S. Reddy v. Yamma Reddy*, 1975 Karn. 194; I.L.R. (1975) Karn. 537.

(23) *Parvathy v. Radhakrishnan*, 1971 Ker. L.J. 729; *Tijabai v. Pathanbhai*, (1971) 2 B.C.J. 17; 1971 S.C. 313; *Santia Kumari v. Natarajan*, (1973) 2 M.L.J. 286; 86 L.W. 487; *C.S. Reddy v. Yamma Reddy*, *supra*.

(24) *Mahini v. Virander Kumar*, 1977 S.C. 1359; *C.S. Reddy v. Yamma Reddy*, *supra*; *Santia v. Cheralathy*, 1972 Ker. 71.

(25) *C.S. Reddy's case*, *supra* at p. 186.

(26) *Anand Singh v. Gurnam Kaur*, *supra*.

(27) *Hareesh Singh v. Lalchand Kaur*, 1977 Ori. L.J. 723.

age does not constitute 'confinement' amounting to an offence under the Criminal Procedure Code.²⁸ But after the completion of five years, the father's right prevails over the mother in respect of such custody and he is entitled to get that custody from the mother. No doubt if the father and the mother are living together this question of competition or rival claims regarding custody of the minor cannot arise. It arises only when there is a separation between the father and the mother either by a decree of judicial separation or by a decree of nullity of marriage or by a decree of divorce. It must be noticed that clause (a) of Section 6 uses the expression "ordinarily" in connection with the custody of the mother upto the completion of five years by the minor but does not use that expression with reference to the custody of the father after the attainment of that age. From this it is possible to argue that the right of the father to have the custody of the minor who is more than five years of age is absolute and there is no question of that custody being taken away from him. But this is not the correct position in law. The word "ordinarily" may not be the appropriate expression to be used in connection with the custody of the father in respect of the minor's person and property. But the legal position is this. The father is absolutely entitled to the custody of the minor child who has attained the age of five unless some disqualification is established to deprive the father of such custody. In *Beant's case*,²⁹ the position of the father *vis-à-vis* his minor children regarding his right to custody has been well brought out (see Section 185) and is described as that of a sacred trust not to be yielded to in favour of a substitute, but if he entrusts the custody and education of his children to somebody else the authority thus conferred upon the latter is essentially a revocable authority and is recallable by him in normal circumstances and except where the Court considers, in exercising its jurisdiction over infants, that by reason of the creation of associations or expectations it would not be desirable to disturb and disappoint them, when the Court will prevent its revocation. The father's claim to custody is supreme. But there can be no question that in all cases of custody of the minor the welfare of the minor is and should be the paramount consideration (*Subramanyam v Santa*)³⁰

3. **Conversion of the Natural Guardian.**—Under the proviso (a) to Section 6 no one is entitled to act as the natural guardian of a minor if he has ceased to be a Hindu. This is to ensure that the general rule that the father takes his minor child also into the new religion which he may embrace does not apply so as to effect an inroad into the numerical strength of the Hindu community. Proselytisation by the Christian missionaries had been going on in such rapid strides during the latter half of the nineteenth century and the early decades of this century that many belonging to the Hindu community have been induced to embrace the Christian religion. A counter-move had been started by the Arya Samaj and other reformist schools to checkmate this denudation of the Hindu community and it was even felt that some statutory check must be imposed to prevent what appeared to be at one time a serious threat to the Hindu religion itself. This section is one of the safeguards designed by the Legislature to prevent the parent who become an apostate to the Hindu religion taking away with him or her to the new religion a minor child born prior to the conversion. The difference between a child born within the Hindu religion and a child born in some other religion really underlies the principle embodied in this

(28) *Banay Lal v. Nisam*, 1969 Delhi 304

(29) 38 Mad 807.

(30) 1967 Andh. Pra. 294. See further *Mohini v. Vender Kumar*, 1977 S.C. 1359 and cases cited in foot note (24) *supra*.

section. A Hindu child is looked upon not only as belonging to the parents but as belonging also to the family of which the parents are members. But in the case of a child belonging to some other religion, this is not the approach and the outlook. A son born in the Hindu fold has to offer religious ministrations not only to the father but to the father's ancestors. No such corresponding religious obligation is to be postulated in the case of children born in other religions. If the father or the mother is allowed to be the natural guardian even after the conversion of the father or the mother, the probabilities are that the tenets of the new religion will be instilled in the child's mind and an abhorrence or antipathy may be built by the efforts of the converted parents into the mentality of the child. This should be prevented in the interests of the Hindu community. Presumably with this intention it was that Proviso (a) to this section has been enacted.

4 Renunciation of the World—Proviso (b) to this section provides that a person who has completely and finally renounced the world by becoming a hermit or an ascetic cannot be the natural guardian of a minor. The words "completely and finally renounced the world" must not be lost sight of in the proper understanding and construction of this proviso. The renunciation to operate as a disqualification must be both complete and final. If a father becomes an ascetic and remains an ascetic for some time and then comes back to lead the family life, the final renunciation cannot be postulated. Such a person can remain the natural guardian of his minor children. A question may arise whether a mother who after the father is the natural guardian of the minor child is also subject to this disqualification of renunciation of the world. The *sathas* do not provide for or countenance, a woman becoming a *sanyasi*. But this proviso does not seem to make any distinction between the father and the mother. It appears that in the contemplation of the Legislature, even a mother can renounce the world and lead the life of an ascetic in the same way as the father. But the real principle underlying this proviso is that, if a person has no attachment to the world and disowns even his own or her own properties he or she is not expected to take much interest in the protection of other's properties or in the protection of the person of the minor. If a man or woman does not care for anything, not even for himself or herself, for such is an ascetic, he or she is not going to care for the welfare of his or her children to provide for which is the main object of this section.

5. Step-Father and Step-Mother.—The expressions "father" and "mother" do not include a step-father and step-mother in the construction of this section. The reason is obvious. The interest of a step-mother or a step-father in the welfare of the child cannot be really postulated, and, more often than not, as the cases of *de facto* guardianship of such persons prior to the Act have betrayed, they do not evince the same interest for the well-being of the minor as the minor's natural parents. Hence it was necessary to provide in the explanation that the step-father and the step-mother cannot be the natural guardians of the minor children.

7. Natural guardianship of adopted son.—The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

NOTES

As already seen in the commentaries under the previous section, in the case of a minor child adopted, be it male or female, the natural guardianship of such a child gets transferred from the natural parent to the adoptive parent. As in the case of natural parents, the father has a prior right to be natural guardian, and only after the father, does the mother come in. The natural father and the natural mother of the adopted child have no right to be the natural

guardians even after the death of the adoptive parents. In view of the abolition of *de facto* guardianship under this Act (*see* Section 11) when a boy is adopted and subsequently the adoptive parents die, any dealing with the property which will be binding upon the minor must be made by one who is appointed a guardian by order of Court. The position is the same even in the case of a non-adopted child whose parents are dead.

The guardianship of the adopted child, where the child is a girl, is the same as in the case of an adopted boy. If there cannot be any distinction between a natural son and a natural daughter for the purpose of preference between the parents, there is no reason why, there should be any difference with reference to such preference as between the adoptive parents. A case may arise where a girl might have been adopted by a woman prior to her marriage, in such a case the only natural guardian for such a girl will be the mother; the husband of the adoptive mother being merely in the position of a step-father. The same principle applies to the case of an adoption of a boy made by a woman prior to her marriage.

If a bachelor makes an adoption and subsequently marries, the wife of the adoptive father cannot be the natural guardian of the adopted boy after the adoptive father's death. Her position is only that of a step-mother. The proposition may be framed like this, if at the time of an adoption of a minor boy or a minor girl by a woman, she had no husband, then she alone can be the natural guardian of the adopted boy or girl. Similarly in the case of an adoption of a boy or a girl by a man who had no wife at the time of the adoption, then he alone can be the natural guardian of the adopted child and the woman that he subsequently marries cannot be the natural guardian of the adopted child after the adoptive father's death.

8. Powers of natural guardian.—(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the Court,—

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him

(4) No Court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890, shall apply to and in respect of an application for obtaining the permission of the Court under sub-section (2) in all respects as if it were an

application for obtaining the permission of the Court under Section 29 of the Act (VIII of 1890) and in particular—

- (a) proceedings in connection with the application shall be deemed to be proceeding under that Act within the meaning of Section 4-A thereof;
- (b) the Court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of Section 31 of that Act; and
- (c) an appeal shall lie from an order of the Court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the Court to which appeals ordinarily lie from the decisions of that Court.

(6) In this section, "Court" means the City Civil Court or a District Court or a Court empowered under Section 4-A of the Guardians and Wards Act, 1890, (VIII of 1890) within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such Court, means the Court within the local limits of whose jurisdiction any portion of the property is situate.

Section 8—Synopsis.

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| 1. Powers of natural guardian | 7. Voidability of transfer without Court's permission |
| 2. Necessary acts. | 8. Procedure for permission of Court for transfer. |
| 3. Reasonable and proper act for the minor's benefit. | 9. Appeal against the Court's refusal of permission. |
| 4. Realisation, protection and benefit of the minor's estate. | 10. Court having jurisdiction. |
| 5. Personal covenant | |
| 6. Permission of the Court for transfer of property. | |

1. **Powers of natural guardian.**—This section has no application to the interest of a minor in joint family property (*Sugha Bai v. Hirala*³¹). The powers of natural guardian under the Hindu Law were wide and were discussed in section 192. In short, a natural guardian could do all acts on behalf of a minor which would be necessary or beneficial to him or to his estate and even alienate the minor's property for such benefit or necessity. Even under this section this position is not departed from except with reference to transfer of minor's immovable property by the guardian, and in the case of such transfer the previous permission of the Court is insisted on. It is not necessary to take the previous permission of the Court when the guardian wants to transfer movable property of the minor, and the transfer by the guardian of movable property of the minor will be governed by the general test already obtaining under the Hindu Law, namely, whether the transfer is for the benefit or necessity of the minor. This section does not deal with the interest of a minor in a joint family property or with the powers of the manager or father of family in respect of alienations of such interest or property (*Mirysala v. Bodireddy*³²). Section 8 does not require Court's permission to acquisition of property

(31) 1969 M.F. 32.

(32) (1966) 1 An. W.R. 368; see also *Narasimha Bahari v. Mandal Bahari*, 1973 (1) C.W.R. 940; *Sunandini Devi v. Babaji*, 1974 Oran 180; *Saharan v. Shree*, (1974) 78 Bom. L.R. 267; *Pothanuram v. Lakshminarayana*, (1976) 1 A.P.L.J. 47; (1976) 1 An. W.R. 512.

by a natural guardian for the benefit of the minor³³. Section 8 has no relevancy in considering the competence of the manager of a joint family to make a gift of ancestral property.³⁴

2. Necessary acts.—The expression *necessary acts* would imply some pressure or need which cannot be avoided except with detriment to the minor or his estate. Maintenance of the minor and his education, payment of taxes on the estate, discharge of debts binding upon the minor, repairs to the property which is sinking and in dilapidation, performance of obligatory ceremonies in the family which the minor has to do, maintenance of dependant members of the household whom the minor is under a legal duty to support, cost of judicial proceedings to defend the estate, all these will be necessities for the meeting of which the natural guardian can spend the income of the estate, sell or convert movable property belonging to the minor and, after getting the permission of the Court, even sell the minor's immovable property. The terms necessity and benefit are generally used side by side in dealing with the guardian's power of alienation. Necessity implies pressure to the estate and relates to its preservation but does not mean actual compulsion but only that kind of pressure which the law recognises as serious and sufficient; while the term benefit implies something done for the improvement or enlargement of the estate.

3. Reasonable and proper acts for the minor's benefit—These words sufficiently protect the minor's interest when it is dealt with by the guardian on grounds which cannot be brought under the category of necessity. Whether a transaction should be upheld as beneficial to the estate depends very much upon the status and position of the minor, the nature of the property, the facility or otherwise of managing it, the quantum of its yield and so many facts and circumstances that it is not possible to lay down any hard and fast rule to guide its determination. It is to be noticed that this section does not put any restriction on the purchase of property for the minor, and hence if out of the income of the minor's estate the natural guardian purchases a property for the minor it will be upheld if it is proper and reasonable in the interest of the minor and here no question of the permission of the Court can arise.³⁵ Sale of property of a minor for his marriage in violation of the Child Marriage Act cannot be said to be for necessity or benefit of the minor (*Pantar Singh v. Bachittar Singh*)³⁶.

4. Realisation, protection and benefit of the minor's estate.—Any act done by the natural guardian for the realisation, protection or benefit of the minor's estate will be upheld under this section as well as under the old law. He can acknowledge a debt which is binding on the minor but he cannot revive a time barred debt. He can contract and compromise, make a reference to arbitration, carry on the business belonging to the minor and incur debts necessary for the purpose, and do everything on the minor's behalf which is reasonable and proper for the benefit of the minor. If for the purpose of recovering an amount due to the estate a suit has to be filed, he can institute the suit and incur the expenses of the litigation necessary to realise the debt due. So also, if a neighbour encroaches on the minor's property and the dispute has to be decided by the Court, the expenses incurred by the natural guardian in prosecuting or defending the suit would be binding on the minor's estate. In short any act done for the minor if it is beneficial to him or to his estate and can be considered as reason-

(33) *Thun Singh v. Barial*, 1974 M.P. 24.

(34) (1970) 2 I.T.J. 532.

(35) See *Thun Singh v. Barial*, *supra*.

(36) 69 Punj. L.R. 293.

able and proper would be upheld, and if such act is to be by way of transfer of the minor's property, such transfer can also be effected by the guardian provided he obtains the previous sanction of the Court for such transfer.

nt.—The guardian can in no case bind the minor or a personal contract entered into by him. This was the old law also. (See Section 192). But the guardian may without charging the estate contract loans for necessary purposes which he could not otherwise meet, such purposes comprising all that would be necessary to meet the wants of the minor and of the other members of his family who have claims either as against him personally or against his estate. The creditor cannot in such cases enforce his claim against the minor personally but may enforce it against his property subject to the condition that this right of recourse of the creditor is not claimable where the creditor is not able to show that on a general taking of account between the minor's estate and the guardian, an amount would be due to the guardian from that estate (*Natesa v. Manicku*).³⁷

After this Act came into force the natural guardian of a minor is competent to enter into a contract to purchase immovable property provided the conditions specified in Section 8 (1) exist and in such a way as not to bind the minor by a personal covenant. A suit for specific performance can be maintained in the absence of any impeaching by the minor or any person claiming under him.³⁸

6. **Permission of Court for transfer of property.**—Sub-section (2) of this section contains a prohibition against any transfer of immovable property of the minor by the natural guardian except with the previous permission of the Court. There is a qualified exception in the case of a lease by the natural guardian, namely, this previous permission of the Court is necessary only if the lease is for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority. A lease for excess period is not valid even for the permitted period mentioned in this section. The absence of the necessary permission of Court for an alienation by the guardian does not make the alienation absolutely void but makes it only voidable at the instance of the minor or one claiming under him.³⁹ But when the minor seeks to avoid it, he cannot be successfully met with the plea that the alienation though not permitted by the Court is really for the benefit of the minor and hence cannot be avoided. But when such an alienation is avoided by the minor he is bound to restore any benefit which he has obtained from the transferee. The position will be the same when a subsequent purchaser from the guardian with the permission of the Court sues for possession of the property from a prior purchaser from the guardian without the permission of the Court (*Nagendra v. Mohini*).⁴⁰ Since this section is a combination of Sections 27, 29 and 30 of the Guardians and Wards Act, the rulings under those sections may usefully be referred to.

Only a natural guardian can apply to the Court for permission to transfer immovable property of the minor. An application by the intending purchaser is incompetent.⁴¹

(37) 47 L.W. 175.

(38) *Laga Reddy v. Ramasubrahmanyam*, 1971 Mys. 194.

(39) *Narasimham Naidu v. Apili Naidu*, (1971) 1 M.L.J. 228; Cf., *Sanku v. Cheralakoty*, 1972 Ker. 11.

(40) 1981 Cal. 181.

(41) *Srinivasulu v. P. Vengalath*, 1972 Bom. 152.

7. Voidability of transfer without Court's permission.—Sub-section (3) of this section says that any disposal of immovable property in contravention of the provision of the previous sub-section regarding the necessity of obtaining the previous permission of the Court for the alienation is voidable at the instance of the minor or any person claiming under him.⁴² The expression "any person claiming under the minor" includes any person who derives from the minor the right to avoid the guardian's alienations. He might derive the right by inheritance, under testamentary disposition, by transfer *inter vivos* or by devolution by law. The expression covers transferees as well as legal representatives of the minor.⁴³ The contravention contemplates not only not obtaining the previous sanction but alienating the property in contravention of the sanction, that is in a different way than the way sanctioned. For instance, a sanction for a mortgage does not authorise a sale or a sanction for a particular amount to be the consideration does not authorise an alienation for a different consideration. Nor does a sanction for alienation authorise an alienation long after when the circumstances have entirely changed and it is unreasonable to say that the permission related to the transaction in question. But if the Court's sanction for a particular alienation has been acted upon without delay, the fact that previously the sanction has been cancelled will not prejudice the right of the transferee and make it a void transaction if the transferee has acted perfectly honestly and in ignorance of the cancellation of the sanction. But when the permission was obtained by the fraud of the guardian by making false representations to the Court and the alienee might be fixed with the knowledge of the guardian's fraud, the alienee will not be protected. But when the transferee acts *bona fide* on the faith of the Court's permission he is not bound to see that the money raised on the sanctioned transfer is utilised for the purpose for which it is intended.

The minor is entitled to avoid the transfer effected by the guardian without the permission of the Court even though the transaction is beneficial to him, and when he thus avoids it, he is bound to restore to the alienee any benefit that he has received. This would be the position even when an alienee from him or from his guardian with the Court's permission avoids the transfer. It is held that in the case of an unsanctioned transfer by the guardian it is not necessary that the minor should file a suit for avoiding the transfer. He can avoid it by any act or conduct on his part showing his intention to avoid it.⁴⁴ Thus he can sell the property to another and leave it to the purchaser to bring a suit for possession against the purchaser under the unsanctioned sale.

It must be remembered that this section contemplates a legal transfer for property which is immovable. There must be a transfer and then the property transferred must be immovable property. If there is a transfer of only movable property, this section has no application. Nor has this section any application to a purchase of property by the natural guardian of the minor. Nor can this section be said to apply when there is no transfer of the minor's property by the guardian. Thus where a family arrangement has been entered into by the guardian on behalf of a minor in which there is no element of transfer of property but only a recognition of the previous title of the parties to the arrangement or where there is a mere surrender of an exproprietary holding on behalf of the minor, no sanction or permission of the Court is necessary, as there is no transfer of the minor's property in such transactions. But if the guardian creates permanent occupancy right in an estate belonging to the minor, it would amount to a

(42) *Ayyappan v. Anandam*, 1976 Ecr. L.T. 531; *Amirtham v. Senthil*, (1977) 1 M.L.J. 1 (F.R.).

(43) *Amirtham v. Senthil*, supra.

(44) *Senthil v. Chinnabai*, 1972 Mar. 71.

transfer of the minor's interest in immovable property and would require the Court's permission for its validity. It has been held that when the Court has permitted the guardian to mortgage the property, such permission does not enable the guardian to confer a power of private sale on the mortgagees and the inclusion of such power in the mortgage would make the transaction not one sanctioned by the Court within the meaning of this section so as to make it binding on the minor or one claiming under him.

8. Procedure for permission of Court for transfer.—Sub-sections (4) and (5) lay down the procedure for the application for permission for alienating the property and the grounds for the permission. Sub-section (4) says that no Court shall grant permission to the natural guardian except in case of necessity or for an evident advantage to the minor. Sub-section (5) provides for the application for permission being governed by the provisions of Section 29 of the Guardians and Wards Act. Cl. (a) of this sub-section says that proceedings in connection with the application shall be deemed to be proceedings under Section 4-A of that Act and Cl. (b) provides that the Court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of Section 31 of that Act. Since the powers of management and alienation given to the natural guardian under this section are practically the same as the powers conferred on the Court guardian under Sections 27 and 29 of the Guardians and Wards Act, they need not be repeated here. Section 31, sub-sections (2), (3) and (4) provide as follows:—

“Section 31

(2) The order granting the permission shall recite the necessity or advantage as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the Court may seem fit to attach to the permission; and it shall be recorded, dated and signed by the Judge of the Court with his own hand, or if from any cause he is prevented from recording the order with his hand, shall be taken in writing from his dictation and be dated and signed by him.

(3) The Court may in its discretion attach to the permission the following among other conditions, namely:—

- (a) that the sale shall not be completed without the sanction of the Court;
- (b) that a sale shall be made to the highest bidder by public auction before the Court or some person specially appointed by the Court for the said purpose, at a time and place to be specified by the Court, after such proclamation of the intended sale as the Court, subject to any rules made under this Act by the High Court, directs;
- (c) that a lease shall not be made in consideration of a premium or shall be made for such term of years and subject to such rents and covenants as the Court directs;
- (d) that the whole or any part of the proceeds of the act permitted shall be paid into the Court by the guardian to be disbursed therefrom or to be invested by the Court on prescribed securities or to be otherwise disposed of as the Court directs;
- (4) Before granting permission to a guardian to do an act mentioned in Section 29, the Court may cause notice of the application for the permission to be given to any relative or friend of the ward who should in its opinion receive notice thereof and shall hear and record the statement of any person who appears in opposition to the application.

It must be remembered that the Court ought not to grant the application for permission to transfer the minor's property unless it is satisfied after making enquiry that the transfer is for the necessity or for an evident advantage to the ward.

9. **Appeal against the Court's refusal of permission.**—Clause (c) of sub-section (5) provides that an appeal lies against an order refusing permission to the natural guardian and that such appeal lies to the Court to which appeal normally lies from other decisions of the Court making the order. It would be noticed that no appeal is provided for against an order granting the application.

10. **Court having jurisdiction**—The Court having jurisdiction is either the City Civil Court or the District Court or a Court empowered under Section 4-A of the Guardians and Wards Act within the local limits of whose jurisdiction the immovable property of the minor or a part of it is situate. The position that where this immovable property is situate within the jurisdiction of more than one Court the application for the permission to transfer the property can be made to any of those Courts does not enable a guardian who has applied and failed to get the permission from one of the said Courts to apply again for the permission to another such Court on the same facts. No doubt if the circumstances are changed and furnish fresh justification for the transfer, there is nothing to prevent the guardian from applying for permission for the alienation to the same Court or a different Court having jurisdiction on the basis of the new circumstances.

9. **Testamentary guardians and their powers**—(1) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in Section 12) or in respect of both.

(2) An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian.

(3) A Hindu mother entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

(5) The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father, or mother as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

(6) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.

Section 3—Synopsis

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| 1. Father's power to appoint a testamentary guardian. | 4. Cessation of testamentary guardianship for a minor girl on marriage. |
| 2. Mother's power to appoint a testamentary guardian. | 5. Competition between testamentary guardians. |
| 3. Powers of testamentary guardian. | |

1. **Father's power to appoint a testamentary guardian.**—The father including the adoptive father can appoint a testamentary guardian in respect of the person and property of his minor child and the testamentary guardian can function as such after the father's death provided the mother is not alive. If the mother survives the father and is competent to act as the natural guardian, the testamentary guardian appointed by the father cannot function during her lifetime, but if she subsequently dies without leaving a will appointing a testamentary guardian the testamentary guardian appointed by the father can function as such guardian. But if the mother who has survived the father has herself appointed a testamentary guardian for the minor child, it is this testamentary guardian who can competently function and not the testamentary guardian appointed by the father. But the father who wants to make a testament and appoint a testamentary guardian must be competent to be a natural guardian in the sense that the father should not be a minor and he should not have become a convert to some other religion or given up the world and become a sanyasi. A testamentary guardian appointed by a father who cannot be the natural guardian on account of his conversion or asceticism cannot validly act even though the will was written prior to his becoming a sanyasi or convert to another religion. In that case if there is the mother, she becomes the natural guardian even during the lifetime of the father who has become a convert or a sanyasi, and whether the father has written a will and appointed a testamentary guardian or not, the mother's right to be the natural guardian prevails. Even if the mother subsequently dies without leaving a will, the testamentary guardian appointed by the father cannot competently claim to function as testamentary guardian because the appointment itself is invalid on account of the incompetence of the father to be the natural guardian on account of his conversion or asceticism and there is no question of the appointment being in a state of suspended animation springing into activity on the death of the mother. Where the father dies leaving a testamentary guardian and is survived by his wife who however is not competent to be the natural guardian of the minor child left by the father, such incompetency arising out of her conversion to some other religion or renunciation of the world, the question whether the testamentary guardian can function as such despite the existence of the mother is not free from difficulty. The wording of sub-section (2) that an appointment made by the father shall have no effect if he predeceases the mother but shall survive if the mother dies without appointing a testamentary guardian may be construed as making the testamentary guardianship created by the father ineffective during the mother's lifetime only if the mother is competent to act as a natural guardian. If she is incompetent for any reason to act as a natural guardian on the father's death, it appears not unreasonable to hold that the testamentary guardian appointed by the father should be in-charge of the minor and his property rather than that he cannot function at all during the lifetime of the incompetent mother. That the father's testamentary guardian can function on the death of a competent mother surviving the father is an indication that the testamentary guardianship created by the father is not invalid or illegal as such on account of the survival of the mother but is only inoperative for the time and is kept in a state of suspended animation during the competency of the mother to act as a natural guardian or during the guardianship of her testamentary guardian.

So also if the father who has appointed a testamentary guardian is survived by the mother who is competent to act as a natural guardian but who after acting as such for sometime becomes incompetent to be the natural guardian by a supervening disqualification arising out of conversion or asceticism, the testamentary guardianship created by the father revives and becomes operative so as to enable the testamentary guardian to step into the shoes of the mother and continue to manage the property of the minor. No doubt the section does not contain an express provision which covers such contingency but that appears to be the obvious intention of the Legislature.

It would be observed that the father, though can act as a natural guardian of his illegitimate child after the death of the mother of that child, cannot however appoint a testamentary guardian for his illegitimate child, a privilege which is given only to the mother of the illegitimate child.

The position of the father regarding his power to appoint a testamentary guardian for his adopted child and his child under a marriage declared a nullity under Section 11 of the Hindu Marriage Act or avoided by a decree of nullity under Section 12 of the Hindu Marriage Act is the same as the power of the father to appoint a testamentary guardian in respect of his legitimate child already considered.

Where the father appoints the mother herself as the testamentary guardian, the mother will function not as the testamentary guardian but as the natural guardian of the minor, because the father's appointment can have no effect during the mother's lifetime as provided for in sub-section (2) of this section. Hence the restrictions imposed by the father in his appointing her as the testamentary guardian will not be binding upon her as they would be in the case of any other testamentary guardian and she is entitled to administer the estate of the minor in the same way and subject to the same restrictions as a natural guardian.

A testamentary guardian appointed by the father in respect of the person and property of his minor daughter cannot function after she is married because on marriage her natural guardian is her husband and he takes charge of the person and property of his minor wife. Even the fact that the husband of the minor girl dies subsequently during the minority of that girl does not revive the testamentary guardianship created by the father. The reason is there is no provision for the revival of the testamentary guardianship on such a contingency as in the case of testamentary guardianship created by the father reviving on the death of the mother. If the husband of the minor girl also happens to be a minor, which is unlikely but may not be impossible, even then the testamentary guardian cannot function, and since there can be no natural guardian in respect of her property, the proper thing to be done for the efficient management thereof is to apply to the Court for appointment of a Court guardian in respect of the property. No doubt as regards the custody of the person of the minor girl the husband though a minor is entitled to have it.

The power of the father to appoint a testamentary guardian with reference to the minor's property does not apply regarding the undivided interest of the minor in joint family property, and this matter is governed by Section 12 of the Act which provides that "where the minor has an undivided interest in joint family property and the property is, under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest." A question may arise whether a Hindu father can manage

appoint a testamentary guardian for the undivided interest of his minor son in the joint family property where the property is not under the management of an adult member of the family. There is no reason why a Hindu father should be held incompetent to appoint a testamentary guardian of his minor children in respect of such interest. Section 12 only says that a guardian cannot be appointed for the undivided interest of a minor in joint family property where that property is under the management of an adult member of the family. If there is no adult member of the family to manage such interest, section 12 obviously cannot be a bar to the power of the father to appoint a testamentary guardian in respect of such interest. Nor does section 9 (1) prohibit such an appointment because it says he can appoint a testamentary guardian in respect of his minor child's interest except the interest referred to in section 12. Section 12 not preventing such appointment, section 9 (1) also cannot prevent such appointment. However the matter is not free from difficulty, especially as the previous case-law on the question of the father's power to appoint a testamentary guardian in respect of the joint family interest of the minor child has not been very clear. See the commentaries under section 12.

2. Mother's power to appoint a testamentary guardian.—A testamentary guardian can also be appointed by a mother for her minor child. This is a departure from the position in the Hindu Law because under that law the only person who could appoint a testamentary guardian is the father and the mother cannot appoint such a guardian, but under this section she gets the right to appoint a testamentary guardian if she survives the father, and when the testamentary guardian is appointed by her after such survival the testamentary guardian is entitled to function as such in supersession of a testamentary guardian appointed by the father. A mother even when her husband is alive can appoint a testamentary guardian if the husband is incompetent to act as a natural guardian by reason of his conversion or asceticism. But before she can competently appoint she must also be entitled to act as a natural guardian, in other words, she should not be herself a convert to some other religion or one who has renounced the world. No doubt, if she is a minor, she cannot appoint a testamentary guardian because no testament or will by a minor would be valid. In the same way as the father can appoint a testamentary guardian either of the person or the property or both of the minor child, so also the mother can appoint a testamentary guardian of either the person or the property or both of the minor child. Irrespective of the fact of existence of a natural guardian, a Hindu mother is entitled to appoint a guardian for the minor children in respect of her separate property bequeathed to the minor under her will.⁴⁵ The definition of guardian in section 4 (b) shows that a guardian appointed by the will of a minor's mother even if it was before the coming into force of the Act would be a guardian within the meaning of that Act and his rights and obligations would be governed by the provisions of that Act.⁴⁶ One respect in which the mother is in a better position than the father is with reference to the appointment of the testamentary guardian regarding an illegitimate minor child. With reference to such child the father cannot appoint a testamentary guardian but the mother can. As regards her power to appoint a testamentary guardian to an adopted child as well as the child of a marriage declared a nullity under section 11 of the Hindu Marriage Act or avoided by a decree of nullity under section 12 of the Hindu Marriage Act, the power is not available to her unless she survives the father or unless the father is not entitled to act as a natural guardian of such a child by reason of his apostasy

(45) *Durgam Naidu v. Balasubramanian*, (1977) 2 M.L.J. 92: 1977 Mad. 904.

(46) *Id.*, p. 95.

or asceticism. Here also, for a valid appointment of a testamentary guardian in respect of such a child the mother should be competent in the sense of her not being a convert to some other religion or of her not having renounced the world.

Where a woman has several children some of whom are minors, it is permissible to her, as in the case of the father, to appoint a testamentary guardian with reference only to some of the children and with reference only to the custody or the property of such children. Thus a woman having four minor children *A*, *B*, *C* and *D*, who are illegitimate, is entitled to appoint a testamentary guardian with reference to person alone to *A* and with reference to property alone to *B* and with reference to both person and property to *C*, leaving *D* with no testamentary guardian. On her death in this illustration the testamentary guardian of *A* cannot administer his estate, and the testamentary guardian for *B* cannot get the custody of *B*'s person, and the testamentary guardian for *C* can function as such both as regards the person and property. These three guardianships may vest in the same person or in different persons. As regards *D*, there being no natural or testamentary guardian, the only effective way of getting his property administered is by moving the Court and having a Court guardian appointed for him under the Guardians and Wards Act.

When a mother appoints a testamentary guardian and there is also a testamentary guardian appointed by the father, on the mother's death it is the testamentary guardian appointed by the mother that can function and not the testamentary guardian appointed by the father. In such a case, the testamentary guardianship created by the father is washed out altogether, and neither the death of the mother nor the death of the testamentary guardian appointed by her will revive the testamentary guardianship created by the father. In this wise also the position of the mother is put on a higher footing than that of the father.

Even in the case of the testamentary guardian appointed by the mother for her minor daughter, that guardianship comes to an end on the daughter getting married, when the son-in-law assumes the guardianship of the person and property of the daughter as her natural guardian.

3. Powers of testamentary guardian.—Under the Hindu Law the testamentary guardian had all the powers of a natural guardian unless they had been restricted by the provisions of the will under which he had been appointed. Under this Act also he has all the powers of a natural guardian as restricted by the provisions of this Act and he has also to observe the conditions imposed on their exercise by the will. No testamentary guardian appointed by the father can act during the mother's lifetime and even afterwards if the mother has herself appointed a testamentary guardian and dies after surviving the father. The testamentary guardian appointed by the father can take charge of the person and property of the minor in pursuance of the authority conferred on him by the terms of the father's will. A testamentary guardian appointed by the father or the mother can act only after the death of the minor's father or the mother as the case may be, and can exercise all the rights of the natural guardian under the Act to such extent and subject to such restrictions if any as are specified in this Act and in the will. In the absence of any prohibition in the will against alienation of the minor's property, any alienation by the testamentary guardian for the benefit or necessity of the minor must have the previous permission of the Court, and the position of the natural guardian as provided for in section 8 and subject to the conditions therein would apply to the testamentary guardian also. The testamentary guardian could not sell

the property of the minor without the prior sanction of the Court. This is so even though Section 28 of the Guardians and Wards Act authorised the testamentary guardian to sell the property as under Section 5 (b) of the Hindu Minority and Guardianship Act, 1956, any other law before the commencement of the Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in the Act⁴⁷. If the will contains a prohibition against alienation, that prohibition must be obeyed by the guardian and he cannot alienate the minor's property even with the permission of the Court. A question may arise whether the testamentary guardian who has been prohibited by the terms of the will from alienating the minor's property is powerless to transfer the property even when there is evident necessity for the alienation. On this question Section 28 of the Guardians and Wards Act has given a solution. That section runs as follows.—

"Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the Court which makes the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order."

From the above section it is clear that the testamentary guardian in such a case is not powerless but has to move as required by section 28 of the Guardians and Wards Act.

4 Cessation of testamentary guardianship for a minor girl on marriage—Sub-section (6) provides that the right of the guardian appointed by will shall where the minor is a girl cease on her marriage. This is as it should be, on the marriage of a minor girl she becomes the ward of her husband who is her natural guardian, and the testamentary guardian who is only a substitute for a natural guardian steps aside when the natural guardian takes his proper place. The fact that the husband is also a minor does not make any difference. Under Section 10 of this Act the fact of the husband's minority may disqualify him from being the guardian of the wife's property, but he is in law entitled to the custody of the person of the minor. In such a case the property of the minor, whether movable or immovable, must be placed in the possession of some other person who may be appointed a guardian under the Guardians and Wards Act on an application made to the Court.

5. Competition between testamentary guardians—In any particular case there may be two guardians appointed for the same minor one by the will of the father, the other by the will of the mother. It is clear from sub-section (2) that the appointment by the father has no effect if the mother survives the father and herself appoints a testamentary guardian. But if for any reason the mother's appointment is invalid, the testamentary guardian appointed for the minor by the father is entitled to take charge of the estate of the minor on the death of the mother. A problem may arise when the father leaves a testamentary guardian to take charge of the property of the minor and the mother who survives the father also leaves a will appointing a person to take charge of the person of the minor. In such a case can it be said that the father's testamentary guardian cannot function at all with reference to the property, there being no mother's testamentary guardian with reference to the minor's property. If sub-section is literally construed, since the mother has died after having appointed

(47) *Duraisingh Nigrah v. Rajendramma*, (1977) 2 M.L.J. 92, 96; 1977 Mad. 304.

ed a testamentary guardian, though only for the person of the minor, the father's appointment cannot revive to any extent. But there is no sensible reason why it should not revive so long as it is not in conflict with the right of the mother's testamentary guardian to the custody of the minor's person. The same can be said of a testamentary guardianship created by the father with reference to the custody of the person and a testamentary guardianship created by the mother with reference to the property of the minor. It cannot be denied that a father can create two testamentary guardianships, one with reference to the person and the other with reference to the property of the minor. So also a mother can appoint one person as the guardian of the person and another as the guardian of the property under her will. Also it cannot be denied that either of them can appoint a person as guardian for the person alone or property alone of the minor. If so much should be conceded, it is difficult to see on what principle both the testamentary guardians, one appointed by the father for the property of the minor, the other appointed by the mother for the custody of the minor's person, cannot be allowed to function simultaneously in respect of their respective spheres.

10 Incapacity of minor to act as guardian of property.—A minor shall be incompetent to act as guardian of the property of any minor

Section 10—Synopsis

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| 1. Minor cannot act as guardian of property. | 3. Interim arrangement prior to majority of guardian |
| 2. Appointment of minor as testamentary guardian. | 4. Minor manager of joint family. |

1. Minor cannot act as guardian of property.—This section says that a minor is incompetent to act as the guardian of the property of any minor. This does not prevent a minor being the guardian of the person of a minor. Nor does it take away the character of a natural guardian from the father or mother of the minor. The incompetency is only with reference to a minor guardian acting for another minor and that too only with reference to the minor's property. Property must include both movable and immovable property and any other interest which is property in the juristic sense such as hereditary shebaitship of an idol or trusteeship of a temple. In the case of a minor father or minor mother of a child, the question whether the natural guardian of the father or mother can act in the place of the minor parent for the minor child cannot be answered in the affirmative as that would only be circumventing the disqualification statutorily enacted in this section on the minor parent. This section disqualifies every minor acting as guardian for the property of another minor whether the former is the father or mother or husband or testamentary guardian. If a father dies leaving a minor wife and an infant child, the infant's natural guardian being the minor's mother, she is entitled to be in custody of the infant's person but as regards the property of the child the minor mother cannot act as the guardian on account of her minority. But the moment she becomes a major, her natural guardianship with all its rights and powers blooms into fullness and her disability to act for the child disappears. During the period of the mother's minority, if the child's property has to be alienated, the only proper thing to do is to apply for a guardian of the property being temporarily appointed under the Guardians and Wards Act for the purpose and to carry on the administration till the mother attains majority. Since there is no difference in the powers of a natural guardian under this Act and the powers of the Court-guardian under the Guardians and Wards Act, there is not going to be any prejudice for the minor by resort to such a course.

It should be noticed that this section has made considerable alteration in the law as it was understood previously. In Section 21 of the Guardians and Wards Act it is implicit that a minor can act as guardian of his wife and child and the wife and child of another minor member of the joint family of which he is the managing member. The guardian in this Section 21 means guardian of both the person and property of his wife and child and though the section is couched in negative language, that seems to be the necessary implication which is only in conformity with the known notions in Hindu Law. But Section 10 of this Act makes the minor incompetent to act as the guardian of the property of even his minor wife and child. It is a matter for debate whether having gone so far, it is the legislative intention to allow a minor member of a joint Hindu family to act as the *kartha* of the joint family property; presumably not.

2. **Appointment of minor as testamentary guardian.**—The question whether the appointment of a minor as testamentary guardian of another minor would be valid or not has to be decided on the essential principles underlying this section. There is nothing in law to prohibit an appointment of a minor as testamentary guardian; only such a guardian cannot act till he attains his majority. In the same way as a widowed minor mother will be incompetent to act till she attains majority as a natural guardian, so also a minor testamentary guardian is incompetent to act till he becomes a major, but when he crosses the outer bound of minority, he becomes vested with all the powers of a testamentary guardian and can proceed to act as such guardian. In the meantime other arrangements have to be made with reference to the management of the minor's property by appointing a guardian under the Guardians and Wards Act.

3. **Interim arrangement prior to the majority of the guardian.**—As already observed since the minority of the guardian only disables him from acting as guardian of the property of another minor and does not disable him from being the custodian of the ward's person the question naturally arises as to who is to be the custodian of the minor's property during the minority of the guardian. The proper thing to do is to apply under the Guardians and Wards Act for the appointment of a guardian to manage the minor's estate till the guardian attains majority and becomes competent to act for the minor in respect of his property also. The powers of the Court-guardian are the same as those of the natural guardian under this Act, and therefore there can be no prejudice so far as minor's proprietary interest is concerned by adopting such interim procedure.

4. **Minor manager of joint family.**—This section only makes it incompetent for a minor to act as guardian of the property of another minor and does not prevent him from acting as the manager of his joint family, carrying with it the administration of joint family property. In fact Section 21 of the Guardians and Wards Act necessarily implies such a position, and that is also the opinion of the judiciary (*Ibrahim v. Ibrahim*⁴⁰, *Budhi Jena v. Dholai*⁴¹). No doubt Section 12 says that if there is an adult member of a joint family no guardian shall be appointed in respect of the undivided interest of a member of the joint family in the joint family property, thereby making it permissible to infer a legislative intention that in the absence of an adult member of the joint family in management of its property a guardian can be appointed for the undivided interest of a minor member of the joint family. But this is an inference from a negative proposition which however does not

(40) 39 Mad. 606.

(41) 1908 Calcutta 7.

compel such inference. There is also some case-law to the effect that apart from the power of the High Court to appoint a guardian in respect of the joint family interest which is also provided for in the proviso to section 12 a guardian can be appointed by the Court for the property of the joint family when there is no adult member of the family to be its manager. When a Court appoints a guardian in respect of a joint family on the ground that all its members are minors, the guardianship ceases on the attainment of majority by any of the members and the guardian appointed by the Court must then hand over the properties to him. (See Section 188 of the body of the book). All this discussion does not lead to any irresistible conclusion that a minor cannot be the manager of a joint family and its property when there are no adult members. No doubt being a minor he cannot enter into contracts on behalf of the family nor is he entitled to sell the family property. There is nothing to prevent him from purchasing property in his name as the manager of the family, spend the family income on the necessities of the family and do all things necessary and beneficial for the family as its *karta*. The position of a minor member of a joint family appears to be as follows: he can be the guardian for the purpose of the custody of the person of his minor wife and child; he can be the manager of the joint family if there is no adult member of the family; he can do all acts for the benefit and necessity of the joint family by way of managing the affairs of the joint family and can enter into transactions of purchase of property for the family, but he cannot alienate the family property for even the benefit and necessity of the family, he appears to be competent to act in his capacity as the *karta* of the family as the guardian over the person of a minor child and wife of another minor member of the family if he is dead and not when he is alive, for, if he is alive, he will be the guardian of the person of his minor wife and child. When a minor member of a joint family is the manager of the joint family in the circumstances above indicated and another member of that family has his own separate property or his wife and child have properties of their own which can have nothing to do with the joint family, the minor acting as the manager cannot deal with those separate properties of the other minor members, and this would be the position even if the non-managing minor member is dead and has left behind him his minor wife and child as members of the joint family having their own separate properties.

11. *De facto guardian not to deal with minor's property.*—After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor.

Section 11—Synopsis

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| 1. <i>De facto</i> guardian | 3. Reason for the abolition of <i>de facto</i> guardianship. |
| 2. Scope of the section. | |

1. *De facto guardian*—This section provides that after the commencement of the Act no person is entitled to dispose of or deal with the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor. Two things are to be noticed in the wording of the section; one that the *de facto* guardian cannot deal with the property of a Hindu minor from the date of the commencement of this Act, and two, impliedly that any act done by the *de facto* guardian prior to the Act is to be judged by the old law. Regarding the old law Section 202 may be referred to. As regards the new law under this section, any alienation by the *de facto* guardian of the minor's property is on the same footing as that of any *ad hoc* guardian and is invalid and not binding on the minor even if it

is beneficial to the interests of the minor, and the alienee cannot justify the alienation on the ground that it is for the necessity or benefit of the minor. Such an alienation is void altogether⁵⁰ and there is no need to have it set aside at the instance of the minor.⁵¹ The alienee is in the position of a trespasser or interloper who has no right in the property at all, and the presumption being that he knows the law he cannot claim any equity in his favour when the minor seeks to recover it from him, the same having passed to him under the void alienation by the *de facto* guardian. When a person in possession of minor's property as guardian is neither his natural guardian nor a testamentary guardian nor a guardian appointed by Court, he must be considered only as a *de facto* guardian and the interdiction in this section will apply (*Rajalakshmi v. Minor Ramachandran*⁵²). It is not open to a stranger who wants to gift some property to a minor to appoint somebody other than the natural guardian to be the guardian in respect of the property gifted and during the lifetime of the natural guardian the guardian mentioned in the gift deed cannot become the guardian of the minor even in respect of that property by reason of the gift (do): *Danovi v. Raghu*.⁵³ A *de facto* guardian can however act as next friend of a minor plaintiff in a suit (*Girdhari Lehar v. Anand Lehar*)⁵⁴.

2. *Scope of the section.*—The Hindu Minority and Guardianship Act has taken away the power of a *de facto* guardian to deal with the property of a Hindu minor which power was available to a *de facto* guardian under the prior Hindu law in certain stated circumstances.⁵⁵ Section 11 abrogates the power of such guardian to deal with any property of a minor whether it is an undivided interest in joint family or not. The incompetence of a *de facto* guardian to deal with a minor's property extends to all the properties of a minor without exception.⁵⁶ The institution of a suit by a minor with his paternal uncle as the next friend cannot come within the prohibition in Section 11 that no person shall be entitled to dispose of or deal with the property of a minor on the ground of his being the *de facto* guardian.⁵⁷ Merely because a *de facto* guardian is not included within the definition of a guardian under the Act, that will not affect the Court's right to pass an order against a *de facto* guardian also under Section 41 (3) of the Guardians and Wards Act.⁵⁸ There being no provision in the Uttar Pradesh Zamindari Abolition and Land Reforms Act dealing with the subject covered by Section 11 of the Hindu Minority and Guardianship Act, Section 11 will prevail over the Abolition Act and transfer of a minor's share in agricultural land by a

(50) *Appanna v. Anthony*, 1978 Ker. L.T. 531; *Kanaki Kamamma v. Appanna*, (1973) 2 An. W.R. 74; 1973 A.P. 201 [sale is void and could not be ratified even by the natural guardian]; *Talari Erappa v. Muttipalleppa*, 1972 Mys. 31 [transfer is void *ab initio* and cannot be validated by ratification by minor on attaining majority]. See also *v. Chennakutty*, 1972 Ker. 71.

(51) *Senthil v. Chennakutty*, *supra*.

(52) (1966) 2 M.L.J. 420; I.L.R. (1967) 3 Mad. 778; 1967 Mad. 113.

(53) 1967 Orissa 68.

(54) 1967 Pat. 8.

(55) *Ranganatha Gounder v. Kuppamuni Naidu*, (1977) 2 M.L.J. 128.

(56) *Ibid*; *Puthamparam v. Lakshminarayana*, (1978) 1 A.P.L.J. 47; (1978) 1 An. W.R. 512.

(57) *Girdhari Lehar v. Anand Lehar*, 1967 Pat. 8.

(58) *Ratan v. Bhanu*, 1978 Bom. 190.

de facto guardian is not valid.⁵⁹ Section 11 is only a provision *ex abundanti cautela* and not a recognition of the legal existence of *de facto* guardianship.⁶⁰

3. Reason for the abolition of *de facto* guardianship.—The doctrine of *de facto* guardianship enunciated in the case of *Hannooman Pershad v. Mst. Babooes*⁶¹ had its origin in the practical equity of the Hindu jurists who felt the necessity of protecting the transactions entered into for the minor's benefit or necessity by one interested in the minor and who took charge of the management of his property for the minor's benefit. When the character of the people changed and the high ideals of generosity and philanthropy gave place to selfishness and dishonesty with the rapid growth in the ideas of individualism and separate property, the institution of *de facto* guardianship underwent a corresponding deterioration and became an easy instrument of unscrupulous profit for friends and relations at the cost of the minor. Wherever there was a minor with any sizable estate with no parent to care for his interest and welfare, there was a race amongst the minor's greedy kinsmen to clutch at his property and deal with it to their advantage posing as the *de facto* guardians of the minor. Cases were not uncommon of several persons claiming to be the *de facto* guardians of the same minor and alienating the minor's property for ostensible necessity or benefit which had no existence in reality but concocted for the purpose by the ingenuity of dishonesty, and one not infrequently finds the minor once possessed of a prosperous estate reduced to the brink of bankruptcy when he attains the age of majority. On account of the growing frequency of such cases, it was thought desirable to abolish the *de facto* guardianship altogether so that no further encouragement might be given to such dishonest relations of the minors out to profit at another's cost.

12. Guardian not to be appointed for minor's undivided interest in joint family property—Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest:

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

Section 12—Synopsis

1. Separate property of a minor member of a joint family.
2. Jurisdiction of the High Court to appoint guardian regarding minor's interest in joint family property.

1 Separate property of a minor member of a joint family—This section prohibits the appointment of a guardian, by a Court other than the High Court for the undivided interest of a minor member in joint family property which is in the management of an adult member of the family.⁶² There is no indication in this section as to what should happen if there is no adult member of the family in management.

There are two matters to be considered regarding the import of this section. A joint family may have an adult member but he may not be in management of the property. Secondly the adult member may not be a male member of the joint family. The fact that

(59) *Munir Lal v. Dy. Director of Consolidation*, 1978 A.W.C. 1.

(60) *Ramangnara Per v. Annappan Ammal*, 1964 Ker. 269.

(61) 6 M.L.A. 393.

(62) *Venkateshkrishnan Reddy v. Amara Reddy*, (1971) 2 E.L.L.J. 466.

there is an adult member of the joint family does not prevent the appointment of a guardian for the undivided interest of a minor member in the family property if the adult member is incompetent to be in management on account of mental defect. In such a case if there is no other adult member and the other members are minors a guardian can be appointed by the Court with reference to the entire joint family property. In such a contingency the guardian so appointed will have to step aside and relinquish his guardianship when any one of the minor members of the family attains majority. Whatever acts had been done by the guardian so appointed will be binding upon the family provided those acts are in conformity with the provisions of the Guardians and Wards Act. Cases have also held that the management of the joint family and its affairs can be taken up not only by an adult male member of the family but also an adult female member like the mother. The question then arises whether when the joint family property including the interests of minor members of the joint family is under the management of their mother who is an adult, a guardian can be appointed with reference to such property. The answer appears to be in the negative because the prohibition under Section 12 against the appointment of a guardian for the interest of minors in the joint family property is operative only when there is no adult member in management and the mother being the adult member and being in management of the property the prohibition operates. It is to be noticed that the section does not say that the adult member in management must be a male and cannot be a female. It cannot be denied that the mother is also a member of the family. It must be observed that the section does not mention the undivided interest of a minor coparcener in coparcenary property. It merely says a minor having undivided interest in joint family property. The minor here can be a girl having an interest in joint family property as, for instance, when a father dies leaving daughter and sons under the Hindu Succession Act the daughter gets also a share in the interest of the father and since the daughter and sons inherit together and continue as members of the joint family and if there is no adult member of that family to manage the property, it is open to the Court to appoint a guardian for the entire property of the joint family. No doubt if any of the sons or even the daughter happens to be an adult and is in management of the entire joint family property, the prohibition under this section against the appointment of a guardian for the interest of the minors has application.

This section does not affect the power of the managing member of a joint family under the Mitakshara to dispose of the property of the family including the undivided interest of a minor member thereof for legal necessity. *Nathani Musa v. Mahesh Mishra*¹.

A minor member of the joint family may have in addition to his undivided interest in joint family property his own separate property which might have been given to him by somebody else. With reference to such separate property of the minor member, if he has not his father or mother or a testamentary guardian appointed by either of them, a guardian can be appointed by the Court. No doubt if there is an adult member of the joint family he will continue to manage the property of that family including the undivided interest of the minor member therein but as regards the minor member's separate property the guardian appointed by the Court with reference thereto can function without being interfered with by the managing member of the joint family.

As already indicated when a minor member of the joint family has his own separate property his father and in his absence his mother will be the natural guardian of such separate property, and if the minor happens to be a girl the natural guardianship of the father or mother as the case may be becomes terminated on the girl's marriage, after which the husband becomes her natural guardian. It is also permissible for the father or the mother of the minor member of the joint family to appoint a testamentary guardian with reference to the separate property of the minor. The question whether a testamentary guardian can be appointed regarding the custody of the person of a minor member of a joint family does not permit of an easy answer. Section 21 of the Guardians and Wards Act implies that the managing member of an undivided Hindu family, though he may be a minor, is competent to act as guardian of the wife or child of another minor member of that family, and this seems to be the correct position being quite in conformity with the notions and sentiments of the Hindus. When there is a joint family and there is a manager for that family it appears incongruous that another should be appointed to be in charge of the custody of the person of a minor member of the family. If the minor member is the wife of another, then the latter is entitled to be in custody of the minor's person. If the minor is the son or daughter of another member of that family, then that member will be the guardian in respect of the person. Even if the minor member is not the wife or the child of another member of the joint family it is proper to presume that the manager of the joint family should be in charge of the custody of the minor member. To appoint a guardian for the custody of a minor member does not appear to be sensible or sound when there is a manager of the joint family.

2. Jurisdiction of the High Court to appoint guardian regarding minor's interest in joint family property.—The proviso to Section 12 says that nothing in this section shall be deemed to affect the jurisdiction of the High Court to appoint a guardian in respect of the undivided interest of a minor member of the joint family. The previous law with reference to the jurisdiction of the High Court to appoint a guardian with reference to such interest, which is saved under the proviso to section 12, is discussed in Section 195 in the body of the book, and is as follows: A Chartered High Court in the exercise of its inherent jurisdiction can appoint the manager of a Hindu joint family as a guardian of a minor member of the coparcenary even in respect of his undivided interest and can empower him to alienate the minor's interest if it thinks it beneficial to do so. The question of the rights of the High Court to appoint a guardian regarding the undivided interest of a minor in the joint family property is not dependent on or affected by the existence or otherwise of a manager for the joint family. Where there is no manager and all the members of the family are minors, the High Court as well as a subordinate Court competent to act under the Guardians and Wards Act can appoint a guardian for the entire joint family property. Even when there is a manager in management of the joint family property who in law is empowered to deal with the minor's interest for the benefit and necessity of the family, the High Court has an inherent jurisdiction to appoint a guardian for the undivided interest of the minor member in the joint family property and authorise such guardian to alienate such interest either by way of sale or by way of mortgage when the High Court comes to the conclusion that such an alienation will be proper and prudent in the circumstances of any particular case. In *Manilal Hurgoan*, In re¹, a joint family consisted of a father and his minor son and possessed only a family house as its property. It was found that a person was willing to purchase the property at a good price only if the sanction of the High Court was obtained for the sale. It was held that the father could

be appointed as the guardian of the minor and empowered to sell the property by the High Court. In *Govindappa v. Doddathayappa*.⁶⁵ it was held after a careful examination of the relevant provisions of the enactments governing the question, that a High Court like that of Mysore which is not a chartered High Court has no jurisdiction to appoint a guardian in respect of the undivided interest of a minor coparcener.

13. Welfare of minor to be paramount consideration.—(1) In the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor.

Section 13—Synopsis

1. Scope

2.

3. Removal of guardian

1. Scope.—In enjoining that in the appointment or declaration of any person as guardian of a Hindu minor, the minor's welfare shall be the paramount consideration, Section 13 does not lay down any new rule or principle materially different from the persona law which was already in force.⁶⁶ Section 13 has no relevancy in considering the competence of the manager of a Hindu joint family to make a gift of ancestral property.⁶⁷ Despite the provisions of Section 19 of the Guardians and Wards Act, the Court should take into consideration the provisions of Section 13 of this Act only in appointing or declaring a guardian.⁶⁸

2. Appointment of guardian.—Sub-section (1) of section 13 says that in the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.⁶⁹ The term 'welfare' must be understood in its widest sense so as to embrace the material and physical well-being, the education and the up bringing the happiness and moral welfare.⁷⁰ In the case of a natural guardian or a testamentary guardian there is no question of any person being appointed as a guardian of a minor, though no doubt when a transfer has to be effected by such a guardian the Court has to be moved for the necessary permission mentioned in section 9. As regards others there is no vested right in any of them to be appointed a guardian. No doubt the relationship to the minor and other facts and circumstances have to be duly weighed before coming to a decision about the property or prudence of appointing a particular person as the guardian of the minor but the paramount consideration to which all these facts and circumstances should be related is the consideration of the welfare of the minor. In considering what will be for the welfare of the minor the Court shall

(65) 1968 Mys. 178.

(66) *Kumalamma v. Lakshmanayyasa*, (1971) 1 Mys. L.J. 307; 1971 Mys. 211.

(67) (1970) 2 I.T.J. 552.

(68) *Venkatamarasiah v. Padali Raja*, (1971) 2 An. W.R. 190; 1971 A.P. 134.

(69) *Mohini v. Virasday Kumar*, 1977 S.C. 1359; *C.S. Reddy v. Yamma Reddy*, I.L.R. (1975) Karn. 597; 1975 Karn. 134; *Raj Kumar Mahant v. Indra Kumar*, 1972 M.F.L.J. 775; *Bawan v. Rajani*, 1964 Pat. 505.

(70) *Raj Kumar Mahant v. Indra Kumar*, supra; *C.S. Reddy v. Yamma Reddy*, supra.

have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kinship to the minor, the wishes, if any, of a deceased parent and any existing or previous relation of the proposed guardian with the minor or his property. If the minor is old enough to form an intelligent preference, the Court may consider that preference also. Even if the father has a better claim to be the guardian as against the mother in any particular case the welfare of the minor may demand that he should remain in the custody of the mother: *Smt. Hardeep Kaur v. Jogindhar Singh*.⁷¹ But no one shall be appointed or declared as a guardian against his will. In the case of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be the guardian of her person, or in the case of a minor whose father is living and is not in the opinion of the Court unfit to be the guardian of the person of the minor, no one should be appointed a guardian of such minor. The presumption in such cases is that none else except the husband in the former case and the father in the latter case can be more interested in the minor or even equally interested (*See* also Section 197 of the body of the book).

2. **Removal of guardian.**—Sub-section (2) of this section provides that no person shall be entitled to the guardianship by virtue of the provisions of this Act or law relating to the guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor. In other words, any person who may be the guardian of a minor, even the father or the mother entitled to act as a natural guardian can be removed if in the opinion of the Court the continuance of his or her guardianship will not be for the welfare of the minor. In *Kusa Parida v. Baishnab Malik*,⁷² it was held that though the mother of the minor would be the natural guardian after the death of the father and mother's remarriage would not *ipso jure* prevent her from being the natural guardian, still the Court on the circumstances of the particular case would appoint somebody else to be the guardian of the minor if it came to the conclusion on consideration of the paramount welfare of the minor that the remarried mother would not be a proper guardian. As already said the Court as the representative of the sovereign and the custodian of the rights and interests of the minor does not and ought not to relax its vigilance over the welfare of the minor and whenever it feels that the welfare of the minor will not be properly served by the continuance of a particular person as guardian and that the interest of the minor would be better served and subserved by the appointment of another as the guardian, the Court is competent to appoint such other person. This power of the Court for removing an existing guardian and appointing another in his place is exercisable not only when there is a natural or testamentary guardian but even when there is a guardian previously appointed by the Court, with this difference however, that in the case of the removal of a natural guardian, it must be shown that such a natural guardian is unfit to be the guardian but in the case of a guardian appointed by the Court his removal can be ordered whenever the Court feels that it would be better in the interest of the minor that another should be appointed. In the case of a natural guardian the ground for removal is his unfitness but in the case of the guardian appointed by the Court the ground of his removal may be the better fitness of another person to be appointed as against the person already appointed. Thus a petition for removal of a father from the guardianship of his minor child will not be ordered unless a detriment to the child by reason of the continuance of the father's guardianship is established, but in the case of a petition *for* removal of any

(71) (1963) Civ. L.J. 285; *Kamabaijibai v. Sunderbai*, 1961 M.F.L.J. (Notes) 69.

(72) 1966 Oriam 90.

other guardian it is enough to show that the interest of the minor will improve by the appointment of another guardian. Right through the main consideration is the welfare of the minor, and that is the paramount consideration that should be kept in mind by the Court when it appoints or declares or removes a person as guardian.

In *Sunil Kumar Choudhary v. Smt. Sati Rani*⁷³ it was held that Section 19 of the Guardians and Wards Act is subject to Section 13 of the Hindu Minority and Guardianship Act

(73) 1969 Cal. 578; *Venkataraman v. Paddy Raju*, (1971) 2 Am. W.R. 190-1971 A.P. 194; *Lata Prasad v. Ganga Sati*, 1973 Raj. 98.

THE HINDU ADOPTIONS AND MAINTENANCE ACT (LXXVIII 1956).

*An Act to amend and codify the law relating to adoptions and
maintenance among Hindus.*

Enacted by Parliament in the Seventh year of the Republic of India as follows:—

CHAPTER I.**PRELIMINARY.**

1. **Short title and extent.**—(1) This Act may be called the Hindu Adoptions and Maintenance Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

NOTES

Preamble.—This is a codifying and amending Act with reference to the law of adoption and maintenance applicable to the Hindus and has to be interpreted as such. When an Act amends and codifies the law relating to any subject, it is the law that is enacted in the provisions of the statute that should prevail and not the law as it stood prior to the enactment. This Act being in respect of the substantive law governing the Hindus, it can have no retrospective operation. The whole scheme of the Act is such that it does not apply to adoptions made before the Act except on any matter on which a definite provision to the contrary is made.¹ The validity and the incidence of such adoptions should be determined with reference to the law as it obtained prior to the date of the commencement of this Act. The codified law has made several changes in the law of adoption. With the passing of the Hindu Succession Act, 1956, sons and daughters are treated equally in the matter of succession. Equality in status is recognised in the matter of adoptions also. The Hindu Adoptions and Maintenance Act, 1956, provides for adoption of boys as well as girls. Formerly a woman could adopt only to her husband but now she can adopt for herself. A widow can now adopt a son or daughter to herself in her own right. No question of divesting of any property vested in any person arises for under the Succession Act she is entitled to take the property absolutely. Under the changed circumstances therefore the question of the sapinda's consent or depriving him of his reversionary interest or the motive of the widow for adoption do not arise.² Since this Act brings about some revolutionary changes in the known law of adoption, the judicial mind should not allow itself to be confused and clouded by any lingering obsession derived from the old state of affairs and conservative notions regarding adoption amongst the Hindus. The religious idea that permeated the institution of adoption has absolutely no place hereafter; the only significance that an adoption under the Act has is of its being a purely temporal one. Though an adoption was made in 1953 before the Act came into force it was held that the Court has to take into account the changed circumstances particularly the disappearance of the basis of the requirement of sapinda's assent on the ground of presumed incapacity of the woman.³

(1) *Tara Chand v. Ram Anand*, 1975 Faj. 20.

(2) *Apparao Chettiar v. Saravapalli Chettiar*, 1978 S.C. 1051 at 1058.

(3) *Ibid*

Short title and extent.—The Act is called the Hindu Adoptions and Maintenance Act, 1956, and extends to the whole of India except the State of Jammu and Kashmir. The Act came into operation on 21st December, 1956, when it received the assent of the President. The law of adoption being a matter of status, this Act would apply even with reference to Hindus domiciled in India but living outside its territories, under the principles of private international law.

2. Application of Act.—(1) This Act applies—

- (a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of Brahmo, Prarthana or Arya Samaj,
- (b) to any person who is a Buddhist, Jaina or Sikh by religion, and
- (c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

- (a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;
- (b) any child, legitimate or illegitimate one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and
- (c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members or any Scheduled Tribe within the meaning of Clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

NOTES

Application of the Act.—Since the wording of the section follows the phraseology of the application section of the Hindu Marriage Act and the Hindu Succession Act, the commentaries under those enactments may be referred to on the question as to whom the Act applies.

Explanation (b) to Section 2 expressly provides for the conferment of the status of a Hindu on a person even though such status is doubtful when the personal law of the parties is invoked. The Act invests a child with the status of a Hindu if one of its parents belonging to a twice born class inducts the child into the Hindu family and brings him up as such.⁴

(4) *Bhikhan v. Commissioner of Wealth-tax*, (1970) 2 M.L.J. 334; 1970 Mad. 249.

3. Definitions.—In this Act, unless the context otherwise requires,—

- (a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family;

- (b) "maintenance" includes—

(i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;

(ii) in the case of an unmarried daughter, also the reasonable expenses of and incidental to her marriage;

- (c) "minor" means a person who has not completed his or her age of eighteen years.

Section 3—Synopsis

1. Custom and usage.

2.

3. Minor.

1. Custom and usage—The definition of 'custom' in section 3 (a) gives importance not to any particular custom or usage as opposed to the dharmaśāstra text but to any rule which having been continuously and uniformly observed for a long time has obtained the force of law in any local area, tribe, community, group and family. A distinction between a rule founded on dharmaśāstra and a rule founded on custom is not germane to the definition of 'custom' in section 3 (a).⁵ For a valid custom or usage, not only should it have been observed as a rule continuously and uniformly for a long time, it should also be certain and reasonable and should not be opposed to public policy. Besides, the custom should not be an obsolete one but one which is part of the living law of the land. Though the second proviso to clause (a) mentions only the discontinuance of the family custom for the purpose of its unenforceability, the same should be the result in the case of the discontinuance of any other custom or usage such as the local custom or custom of the community, for it is the essence of a valid custom that it should be observed at the present day and should not have been merely a thing of the past. Besides there is no indication in the definition as to the precise duration of the custom for its acceptance as a part of the law. The decisions have used the expression "ancient" to indicate an essential quality of a valid custom, the word "ancient" being understood as being beyond human memory.

2. Maintenance—What section 3 (b) prescribes is real maintenance, not a bare or starving maintenance.⁶ The definition of maintenance includes provision for food, clothing, residence, education and medical attendance and treatment, and in the case of an unmarried daughter the reasonable expenses of and incidental to her marriage. The rate of maintenance and the categories of expenses which make up the maintenance allowance, such as the expense

(5) *Haribai v. Babu Anna*, 1977 Bom. 289.

(6) *Kiam Bai v. Bantim Chaudhri*, 1967 Cal. 605.

of education, medical attendance, etc., must necessarily depend on the status of the parties and the age, sex and needs of the claimant, consistent with the means of the person liable to the claim. The words "incident to marriage" are used to indicate the necessity for inclusion in the expenses payable for the marriage of an unmarried daughter not only the actual expenses of her marriage but also the expenses incidental to the marriage, namely, presents at the marriage and other necessary expenses that have to be customarily incurred both before and after the actual marriage such as the expenses of the betrothal function and the nuptials that may take place after the marriage.

3. Minor.—Minor is defined in Clause (c) as a person who has not completed his or her age of eighteen years. This is also the age prescribed under the Hindu Minority and Guardianship Act and to this extent the provision in section 2 of the Indian Majority Act which makes the said Act inapplicable in the case of adoption which was governed by the Hindu Law of majority, which fixed the age of adulthood at 16, must be taken as superseded.

4. Overriding effect of Act.—Save as otherwise expressly provided in this Act,—

- (a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
- (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

1. Overriding effect of the Act.—This section provides that in respect of matters provided for in this Act, this Act prevails despite any provision relating thereto in any other Act previously existing or incident of any custom or Hindu Law which previously governed such matters. By reason of this section, any custom or usage as part of the Hindu law in force prior to the commencement of the Act has ceased to have effect in regard to any matter for which provision has been made in Chapter II except what has been expressly provided in the Act.⁷ It follows that in respect of matters for which no provision is made in the Act the old law must continue to remain applicable.⁸ After this Act came into force there is no room for any customary adoption.⁹ In respect of an adoption which had taken place previously to this Act, the validity of that adoption or its incidents it is the old law that should be applied even though it may be inconsistent with the provisions of this enactment. (See Section 30 post). *Balgunda v. Bhagunda*.¹⁰ This Act is not exhaustive of the law relating to maintenance. It is only in so far as there is some express enactment in the Act that it can be said to be exhaustive in regard to such express provision¹¹. This Act would apply only to those Hindus whose relationship in regard to maintenance is specified in the Act.¹² The

(7) *Danrajji Frolaji v. Chandrababha*, 1975 S.C. 784.

(8) *Dhanraj Jain v. Suraj Bai*, 1973 Raj. 7.

(9) *Kayar Singh v. Surjee Singh*, 1974 S.C. 2161 [Punjab customary law of adoption abrogated]; *Mangun-
gill v. Government of A.P.*, (1970) 2 A.P.L.J. 60 [No illatom adoption can be made after this Act came into force].

(10) 1992 Bom. 7; I.L.R. (1992) Bom. 70.

(11) *Prabhu Prasad v. Prabhakar*, 1977 Mch. I-J. 402.

(12) *Mangun-gill v. Government of A.P.*, (1970) 2 A.P.L.J. 60; 1970 A.P. 15.

principles of the old Hindu law continue to apply in respect of the wife of a coparcener to be maintained out of joint family property and her claim has to be enforced under the old Hindu law and not under this Act.¹³ A right to maintenance which had accrued to a concubine against the estate of her paramour who had died prior to the Act is not taken away or affected by the provisions of this enactment.¹⁴ There is no distinction so far as this right is concerned between a concubine who is barren and one who is not. This right which had accrued to her is enforceable against the persons taking the estate of the paramour as his heirs. *Ramamurthi v. Sitarammamma*.¹⁵

The Act does not deprive a widow's right to arrears of maintenance accrued prior to 21st December, 1936 when the Act came into force.¹⁶

Neither this section nor any other section of this Act takes away the right of a mother under the ordinary Hindu Law to claim a share at a partition between the sons. *Samu Bai v. Shaji*.¹⁷

Section 4 (b) of the Maintenance Act does not affect or repeal Section 468 of the Criminal Procedure Code: *Nanak Chand v. Chandra Kishore*.¹⁸

Section 39 of the Transfer of Property Act is not within the purview of Section 4 (a) of this Act but is also not inconsistent with any of the provisions of this Act so far as a wife is concerned. Section 39 of the former Act in its application to a Hindu wife is not overriden by Section 28 of this Act which is confined only to "dependants" under the Act, the wife, however, not being one of them.¹⁹

CHAPTER II

ADOPTION.

5. Adoption to be regulated by this Chapter.—(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

NOTES

Adoption to be regulated by this Act.—This section applies only to adoptions held after this Act and not before it. The validity of an adoption made after the commencement

(13) *Krishna Meethu v. Padminibai*, 1977 Mah. L.J. 402.

(14) *Rajagopala Rao v. Sitarammamma*, (1966) 2 S.C.J. 179; 1965 S.C. 1970.

(15) 1960 Andh. L.T. 822. (1960) 2 An. W.R. 352.

(16) *Chandrasekhar v. Rajendrasingh*, 1965 Gul. 270.

(17) (1961) Raj. 207.

(18) (1970) 1 S.C.J. 176; A.L.R. 1970 S.C. 446. See also, 1969 Delhi 235.

(19) *Rameswamy Gounder v. Rajalakshmi*, (1965) 2 M.L.J. 579; 80 Mad. L.W. 12; 1967 Mad. 467.

of this Act has to be tested with reference to the provisions of this Act and not with reference to any conditions laid down in the will of the deceased husband of the adopting widow. If, on the other hand, an adoption had taken place before the commencement of this Act, its validity has to be judged with reference to the state of Hindu law prevailing before the Act.¹⁰ If an adoption which had taken place before the Act was valid according to the then law, it still continues to be valid though it may be invalid if it were to take place after the Act. So also if an adoption validly takes place under the Act, the fact that it would be invalid if it had taken place prior to the Act would not affect its validity. This section does not affect the question of an invalidly adopted son being entitled to any property given to him as *persona designata* and the position in respect of this matter would be the same whether the invalid adoption had taken place before the Act or it had taken place after the commencement of the Act. (Sections 168 and 381).

The section mentions adoption as "by or to a Hindu". Adoption is envisaged as being of two kinds. One is adoption by a Hindu and the other is adoption to a Hindu. Adoption to a Hindu was intended to cover cases where an adoption is by one person, while the child adopted becomes the adopted son of another person also. It is only in such a case that it can be said that the adoption has been made to that other person¹¹. Thus when a husband adopts with his wife's consent, the actual adoption would be by the husband while the adoption will be not only to himself but also to his wife.

6. Requisites of a valid adoption.—No adoption shall be valid unless—

- (i) the person adopting has the capacity, and also the right, to take in adoption;
- (ii) the person giving in adoption has the capacity to do so;
- (iii) the person adopted is capable of being taken in adoption; and
- (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

NOTES

Requisites of a valid adoption—This section prescribes the requisites of a valid adoption under the Act, namely, the person giving in adoption and the person taking in adoption must be respectively possessed of the capacity to give and the capacity to take in adoption, and that the person given in adoption must be eligible to be taken in adoption. Section 6 being couched in negative terms is of a mandatory character. All the four conditions or requisites including the condition of giving by a competent person are cumulative and each must be complied with¹²; violation of any of the conditions would make the adoption invalid and there is no scope for the application of the doctrine of *factum valet*.¹³ The capacity to give is described in Section 9, the capacity to take is described in Sections 8 and 7 and the eligibility of the boy to be adopted is described in Section 10. Besides, for an adoption to be valid it must be made in compliance with the other conditions mentioned in Section 11.

(20) *Kanthu v. Kantamihala* (1971) 1 An.W.R. 134

(21) *Baun Ram v. Kameshji*, (1968) 2 M.L.J. (S.C.) 55-1967 S.C. 1761; (1968) 2 S.C.J. 816.

(22) *Dinanjay v. Suraj Bai*, 1973 Raj. 7.

(23) *Lalla Ram v. Gubri Ram*, 1972 All. 540.

"Capacity" in Clause (i) presumably has reference to personal facts like age and soundness of mind; "right" has reference to external circumstances like having a wife, son, daughter, etc.

7. Capacity of a male Hindu to take in adoption.—Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption;

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind.

Explanation.—If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

SECTION 7—SYNOPSIS

- | | |
|---|---------------------------------|
| 1. Capacity of a male to take in adoption. | present section. |
| 2. The difference between the old law and the | 3. Consent of the wife. |
| | 4. Implied consent of the wife. |

1. Capacity of a male to take in adoption.—This section says that any male Hindu who is of sound mind and not a minor can take in adoption a boy or a girl. If he has a wife at the time he cannot make the adoption except with her consent, and if he has more than one wife the consent of all the wives is necessary. But if the wife has ceased to be a Hindu or has renounced the world or has been declared by a Court of competent jurisdiction to be of unsound mind, her consent is not necessary for the validity of the adoption by the husband. This disqualification of the wife will also apply when the husband adopting has more than one wife. A person whose wife has been divorced from him must be considered as wifeless.

Soundness of mind is an essential requirement of a valid adoption and has to be proved when challenged. The burden of proof in such a case is quite substantial because it is well-settled that the evidence to prove an adoption must be sufficient to satisfy the serious onus which rests upon any person who seeks to displace the natural succession by alleging the adoption.²⁴

2. The difference between the old law and the present section.—Under the previous law even a minor, provided he has attained sufficient maturity of mind to understand the nature and consequences of an adoption, could validly adopt. But under the present section, no minor in the sense of a person who has not completed the age of 18 years can make an adoption. Secondly, under the former law an adoption can be made by the husband without the consent of the wife and even against her wish. But this section provides the consent of the wife as a pre-requisite for the validity of the adoption by the husband. Thirdly, under the previous law an adoption can be made only of a boy and never of a girl. But under this section, a man can adopt either a boy or a girl or even both a boy and a girl. The religious disqualification that operated as a disability against a valid adoption being made by one who is a congenital leper or afflicted with any other disability disqualifying him from religious

(24) *Gopi v. Madhulal*, 1970 Raj 190.

communism, has been done away with by this section, and it is now open to any male Hindu to make an adoption, the only disqualification being his unsoundness of mind and minority.

3. **Consent of the wife.**—The requisite that is insisted on by this section with reference to the consent of the wife for making an adoption by the husband is dispensed with when the wife has become a convert to some other religion or has renounced the world. It must be remembered that by mere conversion, the wife does not cease to be the wife of the husband, though conversion is a ground for divorce under the Hindu Marriage Act. But by conversion the wife has ceased to have faith in the Hindu institution of adoption of and therefore her consent ought not to be necessary. So also in the case of a wife who has renounced the world, which means that she has no faith in worldly affairs, her consent is dispensed with. A question may arise whether the consent of a wife living separately under a decree of judicial separation would be required for a valid adoption. The answer appears to be in the affirmative because the decree for judicial separation does not put an end to the marriage and the wife continues to be the spouse of the husband. But in the case of a wife under a void marriage her consent is not necessary as she is strictly speaking not a lawful wife and the husband is entitled to ignore such a marriage as well as the wife of such a marriage. But in the case of a voidable marriage falling under Section 12 of the Hindu Marriage Act, the wife of such a marriage will be considered as a wife coming under this section so long as the marriage has not been avoided, and the absence of her consent for the adoption would invalidate the adoption. A question may arise when an adoption is made by the husband without the consent of his wife under a voidable marriage and the marriage has been subsequently avoided, whether the absence of consent of the wife of such marriage would invalidate the adoption. The answer appears to be in the affirmative because the relevant time with reference to which the necessity for the wife's consent arises is the time of the adoption, and if at that time he has a lawful wife, her consent is necessary for the validity of the adoption under this section. The further disqualification enunciated in the proviso to this section, namely, declaration of the wife by a Court of competent jurisdiction to be of unsound mind, introduces a cloud or confusion into the question of the validity of adoption made by a husband having a lunatic wife. The proviso requires that unless the wife is declared by a Court of competent jurisdiction to be of unsound mind, her consent would be necessary. It is difficult to understand how if really the wife is a lunatic incompetent to comprehend the nature of the adoption and give a valid consent the absence of a declaration by Court of her lunacy would or should affect the question.

It is obvious that this requisite of the wife's consent for a valid adoption by the husband will in practice result in many cases in the inability of the husband to make a desired adoption on account of the dissent of his wife. No woman will be a consenting party to an adoption being made which would take away half of her inheritance to the husband's property on his death and since she is given a right by herself to make an adoption of a boy or girl in the said section, namely, Section 8 when she becomes a widow and since under the Hindu Succession Act she will be absolutely entitled to the property of the husband which may come to her on his death, she may not yield her consent easily.

4. **Implied consent of the wife.**—The consent of the wife which is required under this section for a valid adoption being made by the husband need not be express but can be implied from the circumstances of any particular case. For instance, if it is found that in the course of adoption the wife has been associated with and she has not protested or objected to the adoption, her consent may be held established upon direct and striking proof.

forthcoming to show that such participation or conduct on the part of the wife was not voluntary but forced. But if the husband has more than one wife, this inference of consent by all the wives cannot be drawn merely from participation by one wife alone in the ceremonial functions of the adoption. Since not more than one wife can really be a participator in the ceremonies of adoption the consent of the other wives which is also required for validity of the adoption requires more cogent proof either by the production of their written consent or by proof of their admissions or conduct after the ceremony of adoption. Where a person has married after having contracted a marriage which is void under Section 11 of the Hindu Marriage Act, and both the wives, namely, the wife under the nullity marriage and the wife under the valid marriage solemnised subsequently are alive, it is enough if the husband makes the adoption with the consent of the latter wife, and neither the want of consent by the former wife nor her refusal to give her consent would invalidate the adoption.

8. Capacity of a female Hindu to take in adoption.—Any female Hindu—

- (a) who is of sound mind,
- (b) who is not a minor, and
- (c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind,

has the capacity to take a son or daughter in adoption

Section 8—Synopsis.

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| 1. Capacity of a female Hindu to take in adoption. | 4. Adoption by wife of a void marriage. |
| 2. Adoption by an unmarried woman. | 5. Adoption by wife of voidable marriage. |
| 3. Adoption by married woman. | 6. Adoption by a widow or divorced wife. |
| | 7. Each widow can adopt a son and a daughter. |

1. Capacity of female Hindu to take in adoption—Under the previous law except under the *Kritrima* form a woman cannot adopt to herself, she could only adopt to her husband after his death in some of the provinces, with the husband's consent in some others, with the consent of the husband or with the consent of his sapindas in the Madras School and without the husband's consent in the Bombay School, provided there was no prohibition by the husband against her adoption. But in one thing all the schools were in agreement, namely, during the husband's lifetime his wife cannot make an adoption without his consent. This section provides that any female Hindu who is of sound mind and not a minor and who is not married or if married whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption. It is thus clear that under this section if the husband is alive and is not disqualified as above mentioned by conversion or renunciation or insanity the wife cannot make an adoption at all. But if she is unmarried she is entitled to make an adoption to herself and so also if she is a widow or if her marriage had been dissolved by a decree of divorce. If she is thus qualified she can make an adoption of not only a girl but also of a boy. This new right to a woman of making an adoption and that too of a boy or a girl and even of both is revolutionary and is fundamentally

opposed to the genius of Hindu Law in which an adoption of a girl is absolutely unthinkable. But the adoption made by her as an unmarried woman is only to herself and not to her husband whom the subsequently marries and even when a woman adopts after her husband's death as his widow, the adopted son does not divest the estate vested in her as his heir.

2. Adoption by an unmarried woman.—Under this section a female Hindu who is not married at the time can make an adoption of a boy or a girl or of both. If after making an adoption of a boy she gets married a question may arise whether the husband or the wife of such a marriage can again make an adoption of a boy. The boy adopted by the wife before her marriage cannot be said to be the son of the husband and therefore there is no bar against the husband making an adoption provided his wife gives the consent. But his wife may not give her consent because she is already having a boy who had been adopted by her; but if she gives the consent an adoption made by the husband cannot be said to be invalid by reason of the existence of the wife's adopted son, who will be under Section 14 of this Act in the position of a step-son to the husband of the adoptive mother. So far as the mother is concerned, she will be the adoptive mother of not only the boy adopted by her before her marriage but also of the boy adopted by her husband with her consent. So far as the boy adopted by her husband with her consent is concerned that boy will be the adopted son of both the husband and the wife, but as regards the son adopted by the wife alone before her marriage, this son shall be the adopted son of only the wife and not of both the husband and the wife. The significance of this distinction should not be lost sight of in the matter of determining the respective heirs to the husband and wife when they subsequently die leaving properties.

3. Adoption by married woman.—A married woman cannot adopt at all during the subsistence of the marriage except when her husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind. If the husband is not under such disqualification, the wife cannot adopt even with the consent of the husband, and he alone can adopt with her consent.¹⁶ No doubt by this adoption with her consent she becomes the adoptive mother of the boy adopted by the husband but the adoption is not hers but her husband's. A question may arise as to what should happen if the wife had already adopted a boy prior to her marriage and that boy is still alive and she purports to make another adoption during coverture, on account of the conversion, renunciation or lunacy of the husband. The answer appears to be that she cannot make the second adoption on account of the existence of the son previously adopted by her prior to her marriage. The reason is that any adoption made by her is only for herself and as she has already an adopted son she cannot make another adoption.

4. Adoption by wife of a void marriage.—In the case of a wife under a void marriage coming under Section 11 of the Hindu Marriage Act, since the marriage is void *ab initio* and does not require to be set aside, the wife is entitled to adopt without the consent and despite the opposition of her husband, provided she has no son by the nullity marriage nor has she a son adopted by her previously. Her position is the same as that of an unmarried woman on account of the voidness of the marriage and the condition for a valid adoption by a lawful wife, namely, the conversion or lunacy or renunciation of the husband does not apply to her case. Though her marriage is void, if she has a son by such a marriage who is by Section 16 of the Hindu Marriage Act a legitimate son of hers, she cannot be considered son-

less so as to be in position to make an adoption. The same would be the position in the case of an adoption of a daughter by her.

5. Adoption by wife of voidable marriage.—The position of a wife under a voidable marriage coming under Section 12 of the Hindu Marriage Act cannot be said to be the same as her position would be if she were the wife under a nullity marriage coming under Section 11 of the Hindu Marriage Act. The wife under a voidable marriage is a lawful wife unless and until the marriage is avoided, and so long as the marriage subsists she cannot make an adoption unless the husband is disqualified by conversion, renunciation or lunacy. But if the marriage is avoided by a decree of nullity, she is free to exercise her power of adoption provided she has no son at the time either born to her during coverture or adopted by her husband during that period or born to or adopted by her before marriage.

6. Adoption by a widow or a divorced wife.—A widow and a wife divorced stand on the same footing so far as the capacity to adopt is concerned. If there is already a child born or adopted during the subsistence of the marriage the existence of that child would prevent an adoption of another child of the same sex, though a child of a different sex can be adopted. A case may arise where a widow may be having a plethora of adoptive children. A Hindu female may adopt a boy before marriage; she may marry and her husband may adopt a boy with her consent and this boy will become her adopted son also. During the subsistence of the marriage a son also may be born to her. After the death of her first husband she may marry again and during the subsistence of her second marriage the second husband may adopt a boy and subsequently beget also a son by her. This would show that while a Hindu male cannot have more than one adopted son, a female Hindu may have a plurality of adopted sons. The same reasoning would apply to adoptions of daughters. It would be thus seen that a Hindu male can have only two adopted children, one a son and the other a daughter but a Hindu female can have quite a crowd of adopted children consisting of sons and daughters, not to speak of her other legitimate and illegitimate children. To expose the anomaly and the absurdity of the position the following illustration which though extravagant and improbable is not theoretically at any rate impossible may be considered. A Hindu female prior to her marriage adopts a boy and a girl as she is entitled to do. She chooses to lead a life of shame and immorality and several children of either sex are born to her. She then becomes disgusted with the promiscuous life, marries and settles down to a life of virtue and morality. Her husband anxious to have a child and the wife not yielding any, adopts a boy and a girl. But subsequently the wife conceives and several children are born to her. The husband dies, and the woman marries again. As by this time the woman must have become advanced in age and there is very little prospect of children being born of the second marriage, the second husband makes adoption of a boy and a girl. The second husband also dies, and the woman inherits his property along with his adopted son and daughter. Subsequently the woman dies leaving all the children above-mentioned. All these children will inherit her property and these will be six adopted children of whom three are sons and three are daughters, the children born to her in wedlock and the illegitimate children whom she brought into existence during her unchaste life prior to marriage.

In *Sarwan Ram v. Kalawanti*²⁴, posing the question "what is the adoptive family of a child who is adopted by a widow or by a married woman whose husband has completely and finally renounced the world or has been declared to be of unsound mind even though alive,"

(26) (1968) 2 S.C.J. 316; (1968) 2 M.L.J. (S.C.) 55; 1967 S.C. 1761. See also *Shikha v. Ramchandra*, (1970) 1 S.C.J. 476; 1970 S.C. 343.

the Supreme Court observed: "It is well-recognised that, after a female is married, she belongs to the family of her husband. The child adopted must also, therefore, belong to the same family. On adoption by a Hindu female who has been married, the adopted son will, in effect be the adopted son of her husband also". The Supreme Court left the conclusion inescapable by reason of the provision in Section 12 principal clause that from the date of adoption all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption. The reasoning is hardly convincing and the conclusion is not warranted. For one thing Section 8 ranks together without discriminating, unmarried woman, divorced woman, widow, woman whose husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared to be of unsound mind. The principle of affiliation of the child to the husband of the adopting female would be incongruous where the husband had ceased to be Hindu though the wife would continue to be wife till dissolution of the marriage. Again the conclusion of the Supreme Court would not fit in with the observation of the Supreme Court in a recent case, *Appaswami Chettiar v. Sarangapani Chettiar*: "Formerly a woman could adopt only to her husband but now she can adopt for herself. A widow can now adopt a son or daughter to herself in her own right"

7 Each widow can adopt a son and a daughter.—When a husband dies childless and leaves several widows, each of the widows if she had not previously adopted during her maidenhood could adopt a son and a daughter. This is a departure from the precepts of Hindu Law under which only one of the widows can adopt a son to her husband. In the Nattukottai Chetti community in Southern India there is a custom enabling each of the widows of a person to adopt a son based upon the reasoning that if a man can have children by each of his wives, there is no principle preventing each of the wives giving him a substituted child by adoption. This legislation countenances the logic of this reasoning and has added to it the implementation of another well known sentiment widely prevalent among the Hindus that every one should have at least one daughter as well as a son. If the husband had already adopted a son and that son continues to be alive, his senior widow who had been associated with the husband in making the adoption cannot make a further adoption of a son because the son adopted by the husband would be her adopted son also. As regards the other wives who were not associated with him at the time of the adoption, the question of their capacity to make a further adoption is shrouded in doubt and difficulty. One view is that as the other wives had also consented to the adoption, that consent should be construed as operating as a foregoing of their right to adopt, in view especially of the old law that if there is a son for the husband whether aurasa or adopted, none of his wives after his death can make a valid adoption. The other view is that as under the present Act adoption has been reduced to the position of a purely secular institution and as a widow other than the one who was associated by the husband in the adoption could not be considered as the adoptive mother of the boy adopted by the husband but only as the step-mother under Section 14, there is nothing in Section 11 which only prevents an adoptive mother from making an adoption in the presence of an aurasa or adopted son to the husband to operate as a bar against the other widow who should be considered only as step-mother of the boy adopted by the husband from making a further adoption. There is a lot of force in the latter construction on the wording of the statute.

9. Persons capable of giving in adoption.—(1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provisions of sub-section (3), the father if alive, shall alone have the right to give in adoption, but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind.

(3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a Court of competent jurisdiction to be of unsound mind, the guardian of a child (whether a testamentary guardian or a guardian appointed or declared by a Court) may give the child in adoption with the previous permission of the Court.

(5) Before granting permission under sub-section (4), the Court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the Court may sanction.

Explanation—For the purposes of this section—

(i) the expressions "father" and "mother" do not include an adoptive father and an adoptive mother,

(ia) "guardian" means a person having the care of the person of a child or of both his person and property and includes—

(a) a guardian appointed by the will of the child's father or mother, and

(b) guardian appointed or declared by a Court, and

(ii) "Court" means the City Civil Court or a District Court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.

Section 9—Synopsis

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| 1. Persons competent to give in adoption | 5. Considerations in giving permission to the guardian. |
| 2. Father's capacity to give in adoption | 6. Adoptive parents cannot give in adoption |
| 3. Mother's capacity to give in adoption. | 7. Court. |
| 4. Guardian's right to give in adoption. | |

1. Persons competent to give in adoption—Under this section three persons are mentioned as persons competent to give a boy or girl in adoption and these are the father, the mother and the guardian of the child. This section introduces important changes in this matter. Under the old law the only persons who could give in adoption were the father and in his absence the mother if the father had not prohibited the giving. Under the present section in addition to the mother and the father another person, namely, the guardian has been empowered to give in adoption with the permission of the Court. Under the old law when a father wants to give his boy in adoption there was no need for him to get the consent of his wife who is the mother of the boy; but under this section the consent of the mother is made necessary for the father giving the son in adoption. Under the old law the mother could not give the boy in adoption if the father had prohibited the giving but under this sec.

tion after the death of the father or when he is incompetent to give, the mother is entitled to give the boy without the consent and against the wish of the father and despite his prohibition.

2. Father's capacity to give in adoption.—The father alone is entitled to give a child in adoption but if his wife is alive he must get her consent for giving the child in adoption. The child may be a boy or a girl. The consent of the wife is not necessary if she has finally and completely renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind. If the father is not incompetent to give the boy or girl in adoption by reason of his ceasing to be a Hindu or by his becoming a sanyasi or his being declared by a competent Court to be of unsound mind, nobody else is competent to give the child in adoption, not even the mother of the child. The position is the same even if the child to be given is the child of a nullity marriage coming under Section 11 of the Hindu Marriage Act or of a voidable marriage coming under Section 12 of that Act. Even if the mother of the child is living away under a decree of judicial separation or has been divorced by the father, her consent cannot be dispensed with unless she is suffering from any of the disqualifications mentioned in sub-section (2). It appears that the conversion of the father to some other religion, though it gives a right to the mother to give away the child, is not a disqualification for giving in adoption, though in that case he may delegate somebody else to give the child in adoption. This is the conclusion pointed by the omission of conversion to some other religion being a ground for enabling a guardian to apply for the Court's permission to give the child in adoption.

The consent of the wife to give the child in adoption need not be express but can be inferred from the conduct of the woman taking part in the adoption ceremony or otherwise indicating her consent for the adoption.

3. Mother's capacity to give in adoption.—So long as the father is alive and is not in anyway incapacitated, the mother cannot validly give the child in adoption. But if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind the mother gets a right to give the child in adoption. But the mother should also be competent to give the child in adoption and should not suffer from any disqualification which incapacitated the father from giving the child in adoption. In other words, she should not have been declared to be a lunatic by a competent Court and she should not have become an ascetic having given up the world by a final and complete act of renunciation. Neither the fact that the husband has prohibited the giving nor the fact that she has become an apostate to some other religion appears to be a disqualification for giving in adoption. The child may be the only child or the eldest child or one of whom her husband was specially fond.

The mother here means the natural mother and not a step-mother or an adoptive mother. Hence a step-mother cannot give her step-child in adoption nor can an adoptive mother give her adopted son in adoption. The *Explanation* (1) to Section 9 which says that the term 'mother' does not include 'adoptive mother' cannot by implication mean that the term 'mother' includes the step-mother.¹⁸ But the mother of an illegitimate child who can be validly adopted can give it in adoption without the consent of her paramour to whom the child was born. In the case of a child born of a nullity marriage under Section 11 of the

Hindu Marriage Act or a voidable marriage under Section 12 of that Act, the mother of such a child cannot give it away in adoption during the father's lifetime unless he is disqualified by conversion, lunacy or renunciation of the world. The position of the mother who is living separate from the father under a decree of judicial separation or divorce is also the same in this regard, and she is incompetent to give the child in adoption during the lifetime of the husband.

Where the deed of adoption mentioned that the parents of the boy taken in adoption had of their own free will given the boy in adoption and added that the mother of the boy had put her thumb-mark in the deed in token of her consent, the latter recital does not warrant an inference of the mother giving the boy in adoption while the father was alive but was put in to meet the requirement of Section 9 (2).¹⁹

4. Guardian's right to give in adoption.—Sub-section (4) of this section provides that where both the father and mother are dead or have completely and finally renounced the world or have been declared by a Court of competent jurisdiction to be of unsound mind, the guardian of a child (whether a testamentary guardian or a guardian appointed or declared by a Court) may give the child in adoption with the previous permission of the Court. The disqualification of the parent which lets in the guardian should be either renunciation of the world or unsoundness of mind and not conversion to another religion. It is difficult to say whether the non-inclusion of conversion amongst the disqualifications of the parents for giving a child in adoption is due to an oversight omission or is designed and deliberate. In the absence of any indication to the contrary, it is proper to postulate that the omission is intended, and that therefore a guardian cannot come in to apply for the Court's permission merely on the ground that the parents have ceased to be Hindus. This was the position even before the Act, for under the Hindu Law as it obtained prior to the Act, cases had held that the conversion of either the father or the mother did not operate as a disqualification to give the child in adoption (see Section 131 of the body of the book). The question whether the remarriage of the widowed mother would deprive her of her power to give her child by her former husband in adoption is not covered expressly by any statutory provision in this Act, but the absence of any such disqualification in this section which deals with capacity to give may be taken as an indication that the remarriage of the widowed mother does not operate as a disqualification for giving her child by the former husband in adoption. In this respect the position under the Hindu Law which made remarriage a disqualification for the mother to give has been departed from.

The guardian who is entitled to apply for the permission of the Court to give a child in adoption may be a testamentary guardian or a guardian appointed or declared by the Court. When there is no such guardian already for the minor, anybody who is interested in the child being adopted may apply to be appointed its guardian for the purpose and apply for the necessary permission and have the adoption done after obtaining the permission. Even a step-mother can make such an application, and though the Court will view her application with initial disfavour, it may still grant the application if it is convinced that the adoption would really be for the minor's benefit.

In the case of a major (where his adoption is permissible), in the absence of the father or mother nobody will be competent to give him in adoption because no provision has been

(29) *Sawan Ram v. Kalawansi*, (1968) 2 S.C.J. 316: 1967 S.C. 1761.

made in the Act to meet such a contingency⁸⁰ Hence the adoption of a boy of 21 whose natural parents were dead would be invalid though given in adoption by his step-mother and a registered deed of adoption was also executed.⁸¹

5. Considerations in giving permission to the Guardian.—Sub-section (5) of this section provides that before granting permission to the guardian for giving a child in adoption the Court shall be satisfied that the adoption will be for the welfare of the child. For this purpose due consideration should be given to the wishes of the child having regard to the age and understanding of the child. The Court should also consider whether the applicant for permission has or has not received or agreed to receive and whether any person has made or given or agreed to make or to give to the applicant any payment or reward in consideration of the adoption except such as the Court may sanction. It is thus clear that what the Court should consider in granting or withholding permission to the guardian making an application for the permission is the paramount question of the welfare of the minor. If by the adoption the minor is not going to be in a better position than what he has already been in, the Court will not accord the permission asked for. If on the other hand the adoption is obviously for the advantage of the minor, the Court will not hesitate to grant the permission. If the child is of sufficient maturity of understanding the consequences of his being given away in adoption into another family, and the wishes of the child should also be consulted before deciding whether the permission should be given or not. There is also another factor to be considered on this question, namely, whether the adoption has been decided upon by the guardian with a view to benefit himself, and if the Court finds that any reward has been paid to the applicant or promised to the applicant in consideration of the adoption, the Court may refuse the permission unless it is of the opinion that in spite of such factor of lucre entering into the transaction, the adoption is still for the minor's benefit and the permission for it should be granted. There is a distinction between a payment or reward for the personal benefit of the guardian making the application and the payment or reward for the benefit of the minor to be adopted. In the former case the Court will view the application with a prejudice against granting the application. In the latter case the Court ought not to have any objection to the granting of the permission unless for other reasons it feels the permission should not be granted. *Prima facie*, when there is an agreement between the guardian applying for permission to the Court to give the child in adoption and the person taking the boy in adoption as a result of which agreement the minor stands to gain substantially the Court's inclination must be in favour of granting the permission. One may even go further and say that, in view of Section 13 of this Act by and under which the adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will, unless there is an agreement giving substantial benefit to the child to be adopted the Court should not readily grant the permission.

6. Adoptive parents cannot give in adoption.—The explanation to this section makes it clear that the power to give in adoption which is accorded to the natural father or the mother as already considered is not possessed by the adoptive father or the adoptive mother. This would be the result also of the provision expressly enacted in Section 10 (2) of this Act to the effect that the adopted child, be it a girl or a boy, should not have been already adopted.

(80) *Dhanraj v. Suraj Bai*, 1975 S.C. 1103

(81) *Ibid.*

7. Court—The Court to which an application should be made by the guardian for permission to give a child in adoption is the City Civil Court or a District Court within the local limits of whose jurisdiction the child to be adopted ordinarily resides. The expression "ordinarily resides" imports a residence not of a temporary or fleeting type but of a fairly permanent character though for the time being. If the minor to be adopted is living only provisionally within the jurisdiction of a particular Court for purposes of health or for living with a relation for a short while during the vacation or holidays, and there is no intention to make that place a place of ordinary or normal residence of the minor, which really lies elsewhere, then that minor cannot be said to be ordinarily residing in that place so as to give the Court of that place jurisdiction to entertain the guardian's application for permission to give the child in adoption.

10 Persons who may be adopted—No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:—

- (i) he or she is a Hindu,
- (ii) he or she has not already been adopted,
- (iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;
- (iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

Section 10—Synopsis

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| 1. Persons who may be adopted. | already adopted. |
| 2. The adopted child must be a Hindu. | 4. A married person cannot be adopted. |
| 3. The adopted child should not have been | 5. Age of the adoptee |

1. Persons who may be adopted.—This section lays down the conditions of eligibility of the child to be adopted. First of all, the child must be a Hindu, secondly, it should not have been already adopted, thirdly, it should not have been already married unless there is a custom in the community permitting married persons being adopted and fourthly the child should not have attained the age of 15 years at the time of adoption, unless there is a custom or usage in the community which permits persons who have completed that age being taken in adoption. There is no difficulty in understanding the first condition nor is there any doubt with reference to the second condition because both these conditions were obtaining even prior to the Act. The third condition, namely, that the child to be adopted should not have been married already, is also in conformity with the old law and the exception engrafted on that condition is a concession to the practice in the Bombay School of adoptions being made of even married persons. So also the fourth condition, namely, that the boy or girl to be adopted should not have completed the age of 15 years, is not one to be cavilled at, because that also is quite in keeping with the common notions obtaining amongst the Hindus in general in such matters and the exception to this condition is also a concession to the practice in the Bombay State.

2. The adopted child must be a Hindu—The condition for the adopted child being a Hindu is obvious. But the expression 'Hindu', though it does not take in a Christian or a Muhammadan or a Zoroastrian, does take in any person who comes within the definition of 'Hindu' in section 2 of this Act, namely, a Buddhist, a Jain, a Sikh or any

one who must be presumed to be a Hindu within that definition by reason of his not being an adherent of the Islamic, Parsee or Christian faith. The result is a Buddhist can adopt a Jain boy or girl, a Jain can adopt a Sikh boy or girl and a Hindu who is neither a Jain nor a Sikh nor a Buddhist, can, not only adopt a child who is a Hindu, but also a child who is a Buddhist or a Jain or a Sikh, because all these come within the ambit of the definition of the expression Hindu in Section 2. The other conditions of eligibility insisted on by the old Hindu Law based upon relationship, caste and community, and the prohibitions of adoption of a boy not belonging to the same caste or community or not coming within particular relationship to the adopter have no place after the enactment of this Act. For instance, there was a rule prohibiting a person adopting a child whose mother the adoptive father could not have married. There was also a rule prohibiting a person from adopting his sister's son or daughter's son or another's sister's son. These and other rules such as that a man cannot adopt outside his caste, or a boy suffering from any of those disabilities which disqualify him from inheriting, or a boy who is illegitimate or an orphan, or of a girl, have all been done away with under this section. It must be observed that a man can adopt not only a boy but also a girl either simultaneously or successively, provided of course he does not already have a son or daughter or a son's son or a son's son's son or son's daughter.

3 **The adopted child should not have been already adopted.**—Clause (ii) of Section 10 insists that the child to be adopted, whether a male or a female, should not have been already adopted for its eligibility. The principle underlying this injunction which was also the rule prior to this Act appears to be that a child should not be shunted from family to family by a series of adoptions thereby successively uprooting him and his affections and sentiments which would have a prejudicial effect upon the child's welfare. When a natural parent gives his or her child in adoption, one can fairly presume that he or she must have weighed the *pros* and *cons* of the adoption with reference to the welfare of the child and should have decided upon giving the child after full and fair consideration of all the facts and circumstances bearing upon the happiness of the child to be given away. The same cannot be postulated when an adoptive parent is approached for parting with the adopted boy in adoption to another. Very often adoptions are made in haste only to be lamented upon in leisure, and many have been the cases which have shown bitter developments of hostility between the adopter and the adoptee, and if law should permit the adopted son being again given in adoption, such a disgruntled adopter would only be too glad to barter away the adopted child. It is to prohibit this kind of prejudicial transfer from the point of view of the child's welfare, that this prohibition against the adoption of an adopted child appears to have been enacted.

4. **A married person cannot be adopted.**—The third rule of eligibility is that a person who has been married cannot be adopted. An exception is engrafted on this rule to recognise the adoptions of married persons obtaining in Bombay. As regards the performance of marriage to the adoptee in the natural family there is with the exception of the Bombay High Court a consensus of judicial opinion that it will operate to disqualify a person from being adopted. (See Section 143 of the body of the book)

5. **Age of the adoptee**—Clause 4 of this section provides that the adoptee, whether a boy or a girl, should not have completed the age of 15 years at the time of adoption. Under the law as engrafted in Section 10, a person is not capable of being taken in adoption, if he or she has completed the age of 15 years. The scheme of the Act was not to make a child of 15 years of age or above fit to be taken in adoption. Exception was made in

favour of a custom to the contrary.³² As regards the age of the adoptee under the old law the decisions were not uniform. Some of the rulings were to the effect that the boy should not have had his investiture or the *Upangana* in his natural family, the age for which is said to be 8 years. Some others had held that he must not have completed the age of majority under the Hindu Law which was put at the completion of 15 years. Still others merely decided that he should not have had his marriage performed before the adoption. The Privy Council had laid down that if the boy was of the same *Gotra*, even the performance of the *Upangana* in the family of birth did not prevent the boy being validly adopted. The general trend of the decisions was not for prescribing any age-limit for the adopted boy. This clause steers clear of all doubts and difficulties on the question of age by prescribing 15 years completed as the outer limit beyond which the child could not be validly adopted. This limit applies whether a child is a boy or a girl. It does not require mention that prior to the Act there was no question of an age-limit for the girl to be adopted because except in the community of dancing girls there could be no valid adoption of a girl at all. In the Bombay Presidency there had been a long practice of the adoptee being of any age, even older than the adopter, and the exception engrafted in this clause to the effect that if there is a custom or usage applicable to parties permitting persons who have completed the age of 15 years being taken in adoption such an adoption is not invalid is designed merely to recognise this practice in the Bombay State. It must be observed that the custom or usage which is excepted from the operation of the general rule must be a custom or usage applicable not only in the case of the community to which the adopter belongs but must be applicable also to the case of the community to which the adoptee belongs prior to the adoption. This is a necessary warning to be given, because since under this Act a Jain can adopt a Sikh and *vice versa*, and a Buddhist can adopt a Hindu and *vice versa*, the fact that there is a custom permitting a person who had completed the age of 15 years being adopted in the community of a Hindu to which one of the parties to the adoption belongs should not be taken as validating such an adoption when the other party belongs to a community which does not recognise an adoption of such a person.

What is saved by the section is custom as to adoption and not any rule of law permitting adoption of a person who has completed 15 years of age.³³ In *Balakrishna Raghunath v. Sadashiv Hiru*³⁴ the Bombay High Court points out that the restrictions on the age of the boy to be given in adoption could be traced to the original texts and the relaxation in Bombay owes its origin to the interpretation of such texts as put by the Bombay High Court in a number of decisions liberally construing them upholding the adoptions of persons older than the adopter or removing the ban on the age of the boy to be adopted and that such adoptions were upheld not because of the proof of custom but because of the interpretation placed on the texts with the result that such interpretation is now overridden by Section 4 and not saved by Section 10 (iv) and what is saved by Section 10 (v) is custom which permits the adoption of a boy who has completed the age of 15 years. Therefore it is only if the parties succeed in establishing the custom or usage sanctioning adoption of boys over 15 years of

(32) *Dhanraj v. Suraj Bai*, 1975 S C 1103, 1105.

(33) *Laxman v. Anurajabai*, 1976 Bom. 264.

(34) 1977 Bom. 412 following *Laxman v. Anurajabai*, supra, and dissenting from *Deyana v. Jijela*, 73 Bom. L.R. 667; 1972 Bom. 98. Cf., also *Hirabai v. Babu Dasu*, 1977 Bom. 238.

age then only they could be deemed to be persons capable of being taken in adoption within the meaning of Section 10.

All that is required to be proved under Section 10 is that the custom is applicable to the party whether it is a family custom or tribal custom permitting the adoption of persons above the age of 15 years or married persons.²

11. Other conditions for a valid adoption.—In every adoption, the following conditions must be complied with:—

- (i) If the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;
- (ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
- (iii) if the adoption is by a male and the person to be adopted is a female the adoptive father is at least twenty-one years older than the person to be adopted;
- (iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;
- (v) the same child may not be adopted simultaneously by two or more persons;
- (vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption:

Provided that the performance of *Datta Homam* shall not be essential to the validity of an adoption.

1. Scope.

- 2. Existence of son, son's son or son's son's son to the adopter.
- 3. Adoption of a daughter.
- 4. Disparity in age between the adopter and

the adoptee

- 5. Simultaneous adoptions.
- 6. The ceremonial of adoption.
- 7. Delegation of authority to give or to take in adoption.

1. Scope.—This section deals with the conditions for a valid adoption which are of a general nature, in addition to what had been laid down by the previous sections, and provides that the adopter should not have a son or son's son or son's son's son, natural or adopted living at the time of adoption if she or he wants to make an adoption of a son, and that the adopter should not have a daughter or son's daughter if he or she wants to make an adoption of a daughter. The section also lays down that if the adopter is a male and the

Adoptee is a female, the former must be at least 21 years older than the adoptee and that also if the adopter is a female and the adoptee is a male the former should be at least 21 years older than the adoptee. Clause (ii) of this section adds another qualification or condition to the effect that the same child cannot be adopted simultaneously by two or more persons. The sixth clause of this section provides for the formality of the adoption and says that while the performance of *Datta Homam* is not essential to the validity of an adoption, the actual giving and taking of the boy or girl by the parents or guardian concerned is absolutely necessary for a valid adoption. The departures in this section from the law previously obtaining are that this prescribes a disparity in age between the adopter and the adoptee which was not a condition under the old law and also that it had simplified the formality for giving and taking the boy in adoption by merely insisting on the physical giving and taking and dispensing with the ceremonial of *Datta Homam* generally observed and insisted on by the consciousness of the community prior to the Act.

An adoption which had taken place before the Act but which is void under the then law cannot be said to have become valid by reason of the provisions of the present Act *Nathani Prasad v. Mst. Kachner*³¹ This, however, cannot be said to prevent the same boy being adopted again under the provisions of this Act if there can be no other impediment against it.

2 Existence of son, son's son or son's son's son to the adopter—Clause (i) of Section 11 provides that if the adoption is that of a son the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son, whether by legitimate blood relationship or by adoption, living at the time of adoption. The son whose existence or the existence of whose son or son's son, is a bar to the adoption of a son, must be a Hindu. The result is that if the adopter has a son but that son has become a convert to some other religion, the adopter is not prohibited from making an adoption. Since the son whose existence is a bar to an adoption by the father may be an aurasa son or an adopted son, if either the aurasa son or the adopted son becomes a convert to some other religion, the adopter is entitled to adopt a son, because at the time of adoption he has no Hindu son living either natural or adopted. The existence of an illegitimate son is not a bar to the adoption by the adopter whether the adopter is a male or a female. But the existence of a son of a marriage which is void *ab initio* coming under Section 11 of the Hindu Marriage Act or of a voidable marriage under Section 12 of the Hindu Marriage Act or of a son of a marriage which has been dissolved by a decree of divorce coming under Section 13 of that Act will be a bar to either the father or the mother making an adoption. Even if the parents had adopted a boy previously and that adopted son died leaving his own son or son's son, the bar would be operative. But the existence of the daughter or daughter's daughter, or son's daughter would not prevent the adopter, whether a male or female, from making an adoption of a son. In the case of a widow making an adoption, the fact that she had a son previously who died leaving a daughter-in-law and that daughter-in-law is alive does not prevent the widow from making a valid adoption. In this respect the position is different from the law as it obtained previous to this Act, because under that law when a son died leaving his widow, the power of the son's widowed mother to make an adoption came to an end by reason of the son's widow being in a position to make an adoption which would bring into existence a son's son for the widowed mother, thus preventing her from adopting to her husband.

The question whether a woman having an illegitimate son can make a valid adoption requires to be answered in the affirmative as this clause provides a bar only when there is a legitimate son or an adopted son in existence. No doubt under Section 3 (1) (j) of the Hindu Succession Act, her illegitimate son is related to her as a son and is entitled to inherit her property along with her legitimate sons and daughters, etc. But the existence of an illegitimate son is not mentioned in Section 11 (1) of this Act as a bar to her making a valid adoption. Hence it is proper to conclude that an adoption made by a woman who has no legitimate son or adopted son, or a son, or son's son by such son, will be valid even though she may have an illegitimate son or son or son's son of such illegitimate son. As in the case of an adoption by a male, so also in the case of an adoption by a female, the existence of a son of a void or voidable marriage or a marriage dissolved by a decree of divorce will operate as a bar to an adoption.

3. Adoption of daughter.—Clause (ii) of this section provides that if the adoption is that of a daughter the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter by (whether by legitimate blood relationship or by adoption) living at the time of adoption. The permissibility of adopting a daughter has been newly introduced by this Act. It is a matter of sentiment in many Hindu households that the existence of a son in the family does not complete the happiness of its members and that the existence of a daughter was a necessary element in domestic felicity. It was therefore found desirable that if so inclined a Hindu male or female should not be prevented from introducing into the family an adoptive daughter. The fact that the family is full of sons is not a ground for prohibiting the adoption of a daughter. But if there is a daughter or a son's daughter for the adopter, the adoption of a daughter is prohibited. But if that daughter or the son's daughter who exists has ceased to be a Hindu at the time of the adoption, then the father or the mother of that daughter is not prevented from making an adoption of a girl. But if the daughter is an illegitimate daughter of the adopter, there is no bar to an adoption of a girl. But the existence of a daughter by a nullity marriage coming under Section 11 of the Hindu Marriage Act or of a voidable marriage coming under Section 12 of the said Act or of a marriage which has been dissolved by a decree of divorce under Section 13 of that Act does prevent a valid adoption being made. The fact that a legitimate daughter of an adopted daughter is suffering from any of the disabilities physical or mental which would have prevented her from inheriting the property of another under the previous law would not be a ground for enabling the parent to make a valid adoption.

4 Disparity in age between the Adopter and the Adoptee—Sub-section (ii) provides that if the adoption is by a male and the person to be adopted is a female, the adoptive father should be at least 21 years older than the person to be adopted. The reason for this rule of disparity between the age of the adopter and the age of the adoptee in the case of difference in sex between the adopter and the adoptee is obvious. The principle which underlies this clause is to prevent immoral relations being the object of adoption. If the rule were that there need be no provision for this disparity in age, it is possible for an adopting male to adopt a girl who can well be his wife and create immoral relations with her under guise of an adoption, thus circumventing the rule of prohibition against a man taking another wife during the subsistence of a prior marriage. It would be seen that there was no such rule as to disparity of age between the adopter and the adoptee under the Hindu Law prior to this enactment. It would also be seen that this rule has no application when the adopter and the adoptee are of the same sex, excepting to this extent that the adoptee should not have completed the age of 15 years and the adopter should have attained the age of majority.

Clause (i) of this section deals with an adoption by a female of a male and provides that in such a case the adoptive mother is at least 21 years older than the person to be adopted. Similar reasoning like the one mentioned regarding the adoption by a male of a female would apply to this case also. Here again, the adoptive mother must be a major having completed the age of 18 years and the adopted boy should not have completed the age of 15 years.

A question may arise to what should happen if a girl who is beyond the age of 15 or a boy who has completed that age is adopted or when the difference in age between the adopter belonging one sex and the adoptee belonging to a different sex is not 21 years and more. The answer is that the adoption would be void because it is vitiated fundamentally as violating one of the statutory conditions of a valid adoption. The adoptee in such a case does not get any right in the adoptive family and bears no relation as a result of the adoption to the adopter, nor does the adoptee lose any interest or right in the family of his or her birth. This is provided for in Section 12 of this Act.

5. Simultaneous adoptions.—Prior to the Act there was an institution which is part of the law of adoption known as *Dwyzmushyayana* adoption under which a boy was adopted under an agreement that the adoptee should be the son and perform the duties of the son both to the natural father and the adoptive father. But even there, the boy was adopted only once and by only one person. But Clause (v) provides for a prohibition against the same child being adopted simultaneously by two or more persons. The child may be a boy or a girl. But there cannot be two adoptive persons adopting the same child except when the adopters happen to be husband and wife. The prohibition in this clause is intended to apply to cases where plurality of persons agree to adopt the same boy, and though the prohibition applies to invalidate the simultaneous adoptions of the same boy or girl by two or more persons, it is obvious that the adoption of the same boy even successively by two or more persons is equally invalid except as to the first adoption because, under Section 10 (2) a boy or girl once adopted cannot be adopted again. It is difficult to see the significance of the expression "simultaneously" used in Clause (v) of this section when the adoption of the same child will be invalid even though the adoptions are made successively and not simultaneously by two or more persons. In such a case the first adoption will no doubt be valid.

6. The ceremonial of adoption.—Under the Hindu Law prior to this Act the question of what ceremonies would be sufficient or necessary for a valid adoption had not had a uniform answer (See Section 145.) There were decisions which held that the performance of *Datta Homan* was an essential formality to be gone through for a valid adoption. There were also decisions which did not insist on this formality. The several customary forms and ceremonies observed in the various communities to give publicity to the adoption were held by the rulings to be unessential ceremonials, the dispensing of which did not affect the validity of the adoption. But all the decisions, however, insisted that the physical act of giving and taking the boy should be observed for a valid adoption and that the said act of giving and taking was the operative and the most essential part of the ceremony and hence could not be dispensed with. It is the last aspect on which the decisions had agreed that has been incorporated as an essential condition in Clause (vi) of this section, namely, that the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption. The performance of the ceremony of giving and taking is a

mandatory requirement for a valid adoption.³⁷ The very ceremony of giving and taking is in itself symbolic of transplanting the adopted child from the family of its birth to the adoptive family.³⁸ Where the ceremony of giving and taking is lacking the adoption is invalid and there is no scope for applying the doctrine of *factum valet*.³⁹ The ceremony of physical giving and taking is necessary not only in the case of a minor but also in the case of an adult person where adoption of an adult is permissible.⁴⁰ The execution of a deed in connection with the giving and taking ceremony is not a substitute for the ceremony.⁴¹ Proof of taking in adoption by the adoptive father with intent to take the child in adoption will not be sufficient; it must further be shown that there was giving of the child with the requisite intent.⁴² The words in section 11 Clause (vi) "with intent to transfer the child from the family of its birth to the family of its adoption" are merely indicative of the result of the actual giving and taking by the parents or guardians concerned referred to in the earlier part of the clause. Where an adoption ceremony is gone through and the giving and taking takes place there cannot be any other intention.⁴³ A major orphan cannot be adopted since no one can give him in adoption, there being no parents nor guardian he being a major.⁴⁴ The onus lies on the plaintiff to prove the adoption, namely, giving and taking. Creation of documents is no substitute for giving and taking which must be proved *de hors* any document.⁴⁵ There is a proviso to clause (vi) that the performance of *Datta Homam* shall not be essential to the validity of an adoption. It would be observed that the following requisites are necessary to constitute a valid adoption in the sense of the effective transfer of the child from one family to another:—1. There must be the actual giving of the child in adoption by its natural parent, the father or the mother, or in their absence the guardian as provided for in Section 9.2. There must be the actual taking of the child by the adopter as provided for in Sections 7 and 8: 3. If the giving and taking is not by the parent or the guardian concerned, it must be under his or her authority given to somebody else who actually gives or takes the boy in adoption. 4. There must be the intention to transfer the child from the family of its birth to the family of its adoption. If the intention is that the child should still remain as the child of the family of its birth, though it may be intended that the child should also be the child of the adoptive family, then that is not sufficient to validate the adoption for that merely partakes of the essential characteristic of the *Dwyanushayayana* form of adoption which stands abolished under this Act. It must be observed however, that in the absence of positive proof of actual giving and taking mere notional delivery or expression of intention to take the child or even the execution of an adoption deed would not be sufficient for a valid adoption. Though the proviso to Clause (6) says that *Datta Homam* shall not be essential to the validity of an adoption, there is nothing to prevent the performance of this ceremony but only that when it is in fact performed the adoption should

(37) *Lokeshwar Singh v. Rup Kumar*, 1961 S.C. 1878; *Kashi Nath v. Mahabho*, 1977 Pat. 199.

(38) *Korur Singh v. Suraj Singh*, 1974 S.C. 2161

(39) *Lallan Ram v. Gobar Ram*, 1972 All 540.

(40) *Dhanraj v. Suraj Bai*, 1973 S.C. 1105 affirming, 1973 Raj. 7.

(41) *Kashi Nath v. Mahabho*, *supra*; *Rama Rao v. Achayamma*, (1971) 2 An. W.R. 60.

(42) *Balshidh Singh v. Kanti Singh*, (1975) 77 Punj. L.R. 321.

(43) *Korur Singh v. Suraj Singh*, *supra*.

(44) *Dhanraj v. Suraj Bai*, *supra*.

(45) *Bans Dal v. Dhanraj Sahu*, (1978) 41 Cut L.T. 267.

be taken to have been made when the actual giving and taking had taken place and not when the religious ceremony such as *Datta Homam* is performed. In spite of this provision that it is not necessary to perform *Datta Homam* to validate an adoption, yet, in view of the fact that in any particular community it has become so general that its non-performance would not be thought of at all the absence of evidence as to its performance may legitimately be a ground for suspicion in any doubtful case. *Indromony v. Beharilal*⁶⁸.

7. Delegation of authority to give to take in adoption.—Nobody can give a child in adoption unless he or she happens to be the child's parent or the guardian appointed under a will by the father or the mother or appointed and declared by a Court and such a guardian has obtained the previous permission of the Court to give the boy in adoption. But as we have seen already, the conversion of the father does not deprive him of his power to give away his Hindu boy in adoption, even though the performance of ceremonies accompanying the physical act of giving the boy has to be done vicariously by some Hindu delegate. He can, having decided to give the child in adoption, authorise another to transfer the child to the adopter and the delegate thus authorised can validly give the child in adoption. The same is the position with reference to the mother giving the child in adoption. So also the necessary act of taking the child in adoption can also be delegated if for any reason the adopter is disabled from actually taking part in the essential ceremony of giving and taking. The question whether even though *Datta Homam* is not necessary any other ceremony should be performed at the time of giving and taking must depend upon the particular community observing a prescribed custom for the act. It has no statutory sanction whatsoever as under this section the only essential prescribed is the actual giving and taking by the persons concerned with the intention of transferring the child from the family of its birth to the family of adoption. But it does not stand to reason or practice that any adoption in fact takes place merely by the act of giving and taking unaccompanied by some solemnity of publication in the presence of friends and relations or some ceremonial prescribed by the custom. However simple the formality prescribed by this section for an adoption may be, namely, the mere giving and taking, in view of the facility with which evidence can be concocted with reference to such giving and taking it is always desirable that the Court should insist on very clear and convincing proof of such simple adoption brought about by mere giving and taking of the boy unaccompanied by any rites or ceremony.

12. Effects of adoption.—An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family.

Provided that—

- (a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;
- (b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;
- (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

becomes not only her son but also the son of her deceased husband entitled to claim relationship as such son to all the relations of the husband. Thus if a widow of a coparcener gets an illegitimate child by connection with the surviving brother of her husband and subsequently makes an adoption, the son so adopted is entitled to succeed to the property after the death of the brother of the deceased husband (*Sitabai v. Ramchandra*)¹

3. Prohibitions of marriages in the adoptive and natural family.—The first exception to the rule that the adopted child should be deemed to be the child of his or her adoptive parent for all purposes with effect from the date of adoption and that from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family, is that the child adopted cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth. The prohibition against marrying within the sapinda relationship or within the prohibited degrees of relationship would apply in the case of marriage by the adoptive child both in the adoptive family and in the natural family.

4. Adoption does not divest the property vested in the adoptee.—Proviso (b) to this section provides that any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property including the obligation to maintain relatives in the family of his birth or her birth. This is in conformity with the well-known principle of jurisprudence that once a property vests it does not get divested. This had a qualification in the law of adoption and cases had held that in respect of properties vested in the adopted child prior to the adoption he foregoes that property by reason of his ceasing to be a member of the family of his birth. The doctrine was confined in its application to the property held by him in coparcenership with others and did not extend to property which had vested in him as his own. Thus properties which had already become vested in him before adoption as an absolute owner, either as the sole surviving coparcener or by inheritance or by partition in his natural family are not forfeited by the adoption and the adopted boy continues to hold them even in his new family. The Bombay High Court while holding that properties vested in him either as heir to his natural father or as the sole surviving coparcener would be lost to him as if he were dead on the date of adoption, took the view that properties vested in him otherwise than as above either as self-acquired or inherited from his maternal grandfather or properties obtained on partition were retainable by him even after partition. The views of the Calcutta and the Madras High Courts which differed from the view of the Bombay High Court are to the effect that the adopted son is not divested of property which is his own absolutely at the time of adoption. (See section 146 of the body of the book). It is the view of the Calcutta and Madras High Courts that had found favour with the legislature in this clause. But it is necessary to observe that what is taken by the adopted son from the family of birth to the family of adoption is the property which had vested in him before the adoption. If it could not be said that any property had vested in the sense of his being the absolute owner thereof, then that property is not taken away by him from the family of birth to the adoptive family. The following illustrations will make this matter clear.

(1) A, B and C are brothers constituting a joint Hindu family. A is adopted. The interest which he had in the joint family property is not taken by him to the adoptive

family. But if he has made any self-acquisition prior to the adoption, that would go with him to the new family. If *A* was partner in any business along with his brothers *B* and *C* then his share in the partnership which he has under the contract of partnership with his brothers, is not joint family property but his own separate property and is taken by him to the adoptive family.

(2) *A*, *B* and *C* are brothers constituting a joint Hindu family. They inherit properties belonging to their maternal grandfather and hold them as tenants-in-common. *A* is adopted. He takes his one-third share in the property inherited to the adoptive family.

(3) *A* the father, *B* the mother, and *C* and *D* the sons constitute a joint Hindu family. *A* dies after 1956 and his share in the coparcenary property namely, one-third share is taken by inheritance by his widow *B* and sons *C* and *D* in equal shares. *C* is adopted into another family. *C* does not take his interest in the joint family property, namely, one-third of the property into the new family, but he takes his share in the share of the father in the family property, namely, one-third of one-third into the new family as that does not represent his coparcenary interest but his share taken along with his brother and mother in the interest left by the father by inheritance.

(4) *A* the father, *B* and *C* his sons and *D* a daughter constitute a Hindu family. *A* dies after 1956 and *B*, *C* and *D* inherit *A*'s one-third share in the family property, *B* is adopted. He takes his one-third share in the father's one-third interest but not his own one-third interest in the coparcenary property which would survive to his brother *C*.

(5) *A* the father, and *B* and *C* his brothers and *D*, *A*'s son constitute a joint Hindu family. *D* is adopted. He does not take his interest in the family property into the adoptive family.

(6) *A*, *B* and *C* are brothers and *D* and *E* are respectively the son and widow of *A*. *A* died in 1954 prior to the commencement of the Hindu Succession Act and his share in the family property was held by *D* and *E* in equal shares under the Hindu Women's Rights to Property Act of 1937. *D* is adopted after 1956. *D* does not take his interest in the property which would enure by survivorship to his uncles *B* and *C*.

5. Obligations attaching to the property.—When a person who is adopted takes the property vested in him prior to the adoption to the adoptive family any obligation which attached to the ownership of such property, such as the obligation to maintain the relatives in the family of his or her birth, will continue to attach to that property even after adoption. Supposing the father living in the Madras State, died in 1945, leaving a son and a widow and only agricultural lands. The widow did not take any interest in the property left by the father because he died prior to the Hindu Women's Rights to Property Act of 1937 which was made applicable to agricultural lands in the Madras State only in 1946 and hence did not entitle the widow to get a share in the agricultural land along with the son. The son was adopted after 1956. He having been the absolute owner of the property left by the father, namely, the agricultural lands, he took them to the adoptive family. But there was a right to maintenance in favour of the natural mother prior to the adoption. That right would continue to attach to the property even after his adoption in the new family. So also if the father had died prior to 1956, leaving a son and a daughter, and the daughter even during the father's lifetime had become a widow and returned in indigence to the father's family and was his dependant, and the son was adopted after 1956 taking with

him the property inherited by him from his father into the adoptive family, the obligation to maintain the daughter of the father which was a normal obligation but which had become a legal one on the death of the father in the hands of the son would continue to attach even after adoption to the inherited property.

The words "obligations if any attaching to the ownership of such property" appearing in Clause (b) of Section 12 do not mean that the obligations should be specifically charged on the properties. Thus the liability for maintenance of dependent members of the family, whether charged under documents or not, will follow the property in the hands of the adoptee even when he goes into the new family. No doubt if it is charged under deeds or decrees, it is a *farjari*. Thus if the adopted son prior to his adoption was the sole surviving coparcener of a joint Hindu family possessed of property which had been charged in favour of some charity or for *pooja* to be performed in a particular shrine or for other objects similar in nature, the properties will continue to be burdened with such charge even in the adoptive family.

6. **No divestment on adoption.**—Proviso (c) of Section 12 provides that the adopted child shall not divest any person of any estate which vested in him or her before the adoption. Under the former law the adopted son was considered as having been born on the date of the adoption when the adoption took place during the adoptive father's life and at the time of the adoptive father's death when the adoption had taken place after his death and all the properties which had vested in somebody else but which belonged to the adoptive father at the time of his death could be recovered by the adopted son except such of those properties which had been alienated by the intermediate owner for purposes of necessity or benefit of the estate. For instance, if a widow adopted a boy about 20 years after her husband's death and during those 20 years she had alienated portions of the husband's property which she had inherited from him for her own purposes and not for the necessity or benefit of the estate, the son adopted though several years later was held entitled to recover those properties on the footing that he must be considered to have been in existence from the time of the adoptive father's death. But this section makes a significant change with reference to the effect of an adoption and says in the opening paragraph itself that the adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption. Therefore, the adoption cannot affect or divest the property, though originally belonging to the adoptive father who died possessed of the same, if before the adoption the property had become vested in somebody else, be it the adoptive mother or be it some collateral claiming under some custom or be it any alienee from the adoptive mother or another. A question may arise when a widow makes an adoption within the period of 12 years from the husband's death and the property at the time of the adoption is found to be in possession of a trespasser. Can the adopted son file a suit to recover that property? If he cannot who is the person who is competent to recover? The answer is that under the *Proviso* Clause (c), the person in possession though a trespasser must be considered to have vested in him the property except as against the true owner. The person who would be entitled to recover that property would be the widow as in her all the husband's property had vested on her husband's death, and under the Hindu Succession Act which came into force on 17th June, 1956, she had become the absolute owner of the property left by her husband. Under *Proviso* (c) if the property was in her possession and not in the possession of the trespasser the adopted boy would be powerless to recover the property from her, and there cannot be any difference regarding this powerlessness to recover the property merely because the property, instead of being in the possession of the widow, is in the possession of a trespasser.

Property alienated by a limited owner before 1956 for no legal necessity for the alienation cannot be said to have vested absolutely in the alienee and a suit by a subsequently adopted son for recovery of possession would be competent.⁵¹

The following illustrations will show how Clause (c) of the Proviso is to be understood:—

(1) *A* Hindu dies leaving a widow and some property. The widow becomes absolute owner under the Hindu Succession Act. She makes an adoption in 1957. The adopted son does not get any right to the property left by the widow's husband.

(2) *A*, *B* and *C* are brothers. *A* died prior to 1956 leaving *D* his widow as a member of the joint family along with his surviving brothers *B* and *C*. *D* adopts after 1956. Since *D* had become absolute owner of *A*'s share in the family property as his widow, the adopted son cannot divest that share.

(3) *A* is the father and *B* and *C* are his sons and *D* is his widow. *A* dies after 1956 and *B*, *C* and *D* succeed to *A*'s share in the joint family property. *B* subsequently makes an adoption of *E*. *E* takes an interest in the share of *B* in the coparcenary property and not in *B*'s share in *A*'s interest which *B* had inherited along with *C* and *D*.

(4) *A* and *B* were brothers. *A* died in 1950 leaving a widow *C*. *B* executed a will in favour of *D* of the entire family property and died in 1951. *C* adopted *E* in 1953 and died. *E* is entitled to divest *D* of half the property vested in *C* under the Hindu Women's Rights to Property Act.

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13. Right of adoptive parents dispose of their properties.—Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or the mother of the power to dispose of his or her property by transfer *inter vivos* or by will.

Section 13—Synopsis.

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|---|---|
| 1. Scope | 4. Power of the adopter regarding ancestral property. |
| 2. Agreement to the contrary. | 5. Position when the adopter is a woman. |
| 3. Power of the adopter over his self-acquisition | 6. Adoption of daughter |

1. **Scope.**—This section lays down that unless there is an agreement to the contrary effect, an adoption *ipso facto* does not operate as a deprivation of the adopter, whether a male or a female, of the power of disposal of his or her property by transfer *inter vivos* or by will.⁵² There are three things implicit in this section. The first is that this section has no application if there is a contract to the contrary; the second is that the adopter must have the power of disposition prior to the adoption; and the third is that power is sought to be defeated by the mere fact of adoption.

2. **Agreement to the contrary.**—The main provision of the section has no operation where there is an agreement to the effect that the adopter should not alienate the property to the prejudice of the adoptee. Such an agreement cannot be postulated merely from the factum of adoption but has got to be specifically entered into. If the

(51) *Ramesh v. Nibhat*, 28 Bom. L.R. 667; 1972 Bom. 98.

(52) *Mahesh Singh v. Waide Singh*, 1971 S.C.D. 305.

adopter is a minor, the agreement will be entered into with the guardian of the minor, but if the adoptee is a major as in some of the adoptions permitted by custom, the agreement may be with the adoptee himself. Very often this agreement takes the form of adoption deed containing the stipulation that the adopter will not alienate the existing properties and making the adoptee the joint owner thereof with the adopter. Sometimes the adoption deed merely recites the factum of adoption and that the son adopted will have all the rights of a son. In this latter case, the deed does not amount to an agreement not to alienate the property, and if the property is the self-acquisition of the adopter, a transfer by him of such property cannot be questioned by the adoptee as being beyond the adopter's powers by reason of the adoption. But if the property is the ancestral property of the adopter, he cannot make a gift of it after the adoption irrespective of the question whether the adoption agreement does or does not contain a clause against alienation by the adopter. It may also happen that after the adoption, the self-acquisition of the adoptive father has been treated as joint family property belonging to both the adopter and the adoptee, even in this case the adopter cannot alienate the property by transfer *inter vivos* except for benefit or necessity of the family or for discharge of antecedent debts of the adoptive father, because the property has become impressed with the character of a joint family property in which the son adopted has also obtained a share. What is necessary in this connection is that the mere act of adoption or even the execution of an adoption deed does not operate as an agreement on the part of the adopter not to alienate the property over which he has disposing power. Under the Hindu Succession Act, section 30 a Hindu father or any coparcener can dispose of his interest in the joint family property by will, and the fact that he has adopted a boy or girl cannot prevent his testamentary disposition of his self-acquired property or even his interest in the joint family property, unless there is an agreement to the contrary.

3 Power of the adopter over his self-acquisition.—The power of the adoptive father to dispose of his self-acquisition in any way he likes either by transfer *inter vivos* or by testamentary disposition is absolute and is not taken away by the mere act of adoption unless the adopter has agreed that he will not alienate the property. If in any particular case it is found that subsequent to the adoption he has treated the self-acquired property as the property of the joint family and thereby enabled the adopted son to acquire an interest therein as a member of the family, then the right to alienate the property is taken away from the father with the result that while he cannot transfer it *inter vivos* by gift, he can transfer his share in it by testamentary disposition under section 30 of the Hindu Succession Act. But if he has not conducted himself with reference to his self-acquired property in such a way as to impress on it the character of joint family property, then there is no fetter imposed by the adoption to deal with it in any way he likes either by transfer *inter vivos* or by will. But this absolute power of alienation can be curtailed or taken away by an agreement or adoption deed entered into under which the adopter has undertaken not to alienate the property though it is his self acquisition. A question may arise whether when the restriction is only in an agreement and the adopter makes an alienation to a *bona fide* alienee for consideration without knowledge of the restriction, the alienation can be impeached by the adoptee. Since an agreement does not require registration and even if registered does not operate as a notice to any person subsequently dealing with the property over which the restriction is intended to operate, the alienee cannot be defeated at the instance of the adoptee if he is able to show that he had no knowledge of the restriction and that he had purchased it for consideration *bona fide* in the belief that the alienor is entitled to alienate the property. But if the restriction

on alienation is imposed by a registered deed of adoption, the alienance will be affected with the notice of the restriction and the plea of *bona fide* purchaser can have no basis.

4. **Power of the adopter regarding ancestral property.**—Before this Act the adoptive father could not after adoption and during the lifetime of the adopted son alienate the property except for his antecedent debts or for family necessity or benefit. He could not transfer the property by will or gift, and this fetter operated even in respect of his share in the family property. Under the Hindu Succession Act, section 30, a power has now been conferred on a coparcener to transfer by will his interest in the joint family property without affecting the interest of the adopted son who becomes a coparcener with him. But the old restriction against the right to make a gift of the family property still remains, and except for pious purposes and within permissible limits he cannot make a gift of the family property. This position is applicable not only in respect of properties which were originally ancestral but also to properties which become joint family property by treatment, blending, etc., though originally the self-acquisition of the adopter.

5. **Position when the adopter is a woman.**—Under the Hindu Succession Act a woman who inherits her husband's estate or who has acquired property in any other way except under decrees or documents which confer on her only a life or restricted estate, becomes an absolute owner of the property, and if she subsequently makes an adoption the adopted son does not get any right in that property. The fact that the property was originally the ancestral property in the hands of her husband does not enable the adopted son to get an interest in that property. No doubt if the widow dies without alienating the property the adopted son would succeed to the property as her heir, but during her lifetime he has no right to question her regarding her dealings with the property. The theory of relation back applicable prior to this Act which had enabled the son to claim that he must be considered to have been born at the time of the adoptive father's death has no longer any operation and the right of the adopted son springs only on the date of the adoption. The adoption does not divest any estate vested in anybody and since the property in the hands of the woman who makes an adoption is her own property at the time of the adoption in whatever way it might have been acquired by her, the adopted son cannot claim to have any interest in that property. In this connection one exception ought to be remembered. If the adopting widow has obtained the property of her husband for a limited estate with the power of adoption to him under a will or settlement and the will or the settlement mentions that on adoption by her the adopted son should take the property, the widow would be divested by the adoption and any intermediate alienation by her contrary to the terms of the will or settlement will not be binding on the adopted son. The same will be the position if the adoption is of a daughter instead of a son.

6. **Adoption of daughter.**—The foregoing discussion under this section is with reference to the adoption of a son. In the case of adoption of a daughter, the adopter whether a man or a woman, cannot be deprived of her power of alienating the property which belongs to him or her, either by gift or by will, unless there is an agreement to the contrary. In the case of an adoption by a man or a woman of a daughter, there is no question of the adoptee getting an interest in the joint family property as in the case of a son adopted. The property of the adopter therefore is his or her absolute property and the adopted daughter does not get any interest in it by virtue of the adoption. But if the adopter dies intestate the property left by him or her would be taken by the adopted daughter as his or her heir. So also if the adopting woman had taken the property under a will or settlement by

the husband that she should have only a life-estate or a restricted estate till she makes an adoption and that on her making the adoption of a girl the estate which the adopter has taken should stand divested, the girl adopted by the woman will be entitled to take the property from the widow if it is still with her or recover it from third parties to whom the widow in the meantime might have sold it or otherwise disposed of it.

14. Determination of adoptive mother in certain cases—(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the seniormost in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child.

Section 14—Synopsis.

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| 1. Scope. | 4. Adoption by widower. |
| 2. Adoption by one having one wife. | 5. Adoption by bachelor. |
| 3. Adoptive mother in the case of plurality of wives. | 6. Adoption by a widow or unmarried woman. |
| | 7. Adoption by divorced spouse. |

1. Scope.—This section deals with the determination of the adoptive mother in certain cases. When a man or woman makes an adoption to himself or herself, there cannot be any difficulty in postulating that the adopter is the adoptive parent. If the adopter is a male he will be the adoptive father and will rank as the natural father for all purposes, especially succession. If the adopter is a female, then she will be the adoptive mother ranking as a mother for all purposes, chiefly succession. The question that this section seeks to answer is the legal relationship of the spouse of the adopter, whether existing or prospective. One thing, however, is clear, and that is that if the spouse of the adopter is not the spouse of the adopter at the time of the adoption but becomes such spouse only after the adoption, then that spouse cannot bear the relationship of the adoptive mother or father as the case may be to the adoptee, retrospectively tracing her or his relationship through the adopter.

2. Adoption by one having one wife.—Sub-section (1) of this section says that where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother. This simple enunciation of an apparently simple rule is not as simple as it appears. It will be noticed that there is no mention of the consent of the wife for the adoption. The reason is not difficult to divine. Under section 7, a male Hindu cannot make an adoption without the consent of his wife unless the wife is under any of the disabilities mentioned in the proviso. If the wife is under no such disability, he cannot adopt without her consent and if he adopts without her consent the adoption is void. But supposing she has been declared to be of unsound mind by a Court of competent jurisdiction and the husband adopts as he is entitled to do without her consent, in such a case the wife of the adopter will be considered to be the adoptive mother of the adoptee for all purposes even though she has not given her consent as she cannot in fact or in law. If she dies

leaving her ~~widow's~~ property, the son adopted by her husband is entitled to that property as her son. This position is applicable to the adoption of a daughter also. So also if the wife has become a convert to some other religion and the husband makes an adoption without her consent as he is entitled to do under Section 7, and subsequently the wife gets reconverted to the Hindu religion and resumes cohabitation with the husband and there has been no dissolution of marriage by divorce on the ground of conversion, the wife will be considered to be the adoptive mother even though her consent was not sought or given during the period of her apostasy; the reason is that her conversion had not operated to sunder the marriage bond so long as there had been no decree of divorce and the wife continues to be the wife of the adopter even at the time of the adoption even though her consent is unnecessary for the adoption under Section 7 of the Act.

3. Adoptive mother in the case of plurality of wives.—Sub-section (2) says that when an adoption has been made with the consent of more than one wife, the seniormost in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers. It may be observed that the wife who should be deemed to be the adoptive mother must not be one who has not consented to the adoption. It may happen that the adoptive mother may not be the seniormost of the wives but she must be the seniormost of the consenting wives. For instance the seniormost wife may be suffering under a disability mentioned in Section 7 which would entitle the husband to ignore her and adopt with the consent of the other wives not having the disability. In such a case the adoptive mother is the seniormost of the consenting wives and not the seniormost of the wives. The expression "seniormost in marriage among them" means seniormost in marriage among the wives with whose consent the adoption had been made. No doubt if none of the wives is having any disability mentioned in the proviso to Section 7, the consent of all the wives would be necessary for a valid adoption and the seniormost wife would become the adoptive mother of the adoptee. It is necessary to observe that the seniormost is with reference to the time of the marriages with the wives and not with reference to their actual age. It is also to be observed that the old principle that the adoptive mother is that wife who was actually associated with the husband in the ceremony of adoption and that all the other wives of the adopter even though they had consented to the adoption were mere step-mothers whether they were seniors or juniors to the associated wife, no longer applies, and the only test of adoptive motherhood under the present section is the seniority of wifehood in marriage among the consenting wives. Thus if the adopted son dies, it is that wife of the father who was married to him earlier among the consenting wives that can claim to succeed to the adopted boy as his mother, and all the other wives are excluded by her as his step-mothers. So also if subsequent to the adoption these wives conceive and get sons, the adopted son is entitled to succeed along with the natural son of the seniormost wife of the adoptive father to the property left by that wife but the adopted son will be postponed to the natural sons of the other wives when succession opens to their properties on their death.

4. Adoption by widower.—Sub-section (3) provides that where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be step-mother of the adopted child. This provision read with Section 12 does away with all the confusion that has been caused by the case-law which attempted to give an adoptive mother to a boy adopted by a widower. It may be contrary to nature to say that there can be a boy without a mother. But adoption is not a law of nature but is a law of fiction and ought not to be complicated by cold logic and reasoning to extend it beyond permissible and permitted limits and limitations.

5. **Adoption by a bachelor.**—What has been said about the adoption by a widower applies equally to the case of an adoption by a bachelor. In either case there is no wife to the adopter at the time of the adoption, so that there is no adoptive mother to him applying the main principle that underlies the section, namely, that no one can be an adoptive mother to the adopted child unless at the time of the adoption she happens to be the wife of the adopter. If the adopting bachelor makes an adoption and subsequently marries, the wife is only the step-mother of the adopted boy so that if she dies leaving her property the adoptive father would take her property to the exclusion of the adopted son if she leaves no issue, and her child shall exclude the adopted child if she leaves her own issue.

6. **Adoption by a widow or unmarried woman.**—As in the case of an adoption by a widower or a bachelor, so also in the case of an adoption by a widow or an unmarried woman, the spouse whom she marries after the adoption will be in the position of a step-parent to the adoptee. The result is that if the adoptee dies and the adoptive mother has predeceased him, the husband of the adoptive mother will be in the position of his step-father to the adoptee and can succeed to the adoptee only if there are no nearer heirs to him. So also if the adoptive mother's husband dies leaving children born of the marriage, those children will succeed to the property of the mother's husband to the exclusion of the adopted son.

7. **Adoption by divorced spouse.**—There is no provision in the section with reference to the ascertainment of the adoptive mother or father when the adoption is made by a divorced spouse. If a divorced wife makes an adoption as well she may when there is no child of the marriage, and subsequently she marries, there is no express provision that the subsequently married husband is the step-father of the adopted child, and so also the section does not provide for a case of an adoption by a husband who has been divorced by his wife who is living and the husband marries again. Though the section does not provide for these cases expressly, the result will be the same, it is presumed, as in the case of an adoption by a widower or bachelor or by a widow or unmarried woman. Thus if a woman who has been divorced by her husband makes a valid adoption and subsequently marries, the person who thus marries her is in the position of a step-father to the adopted child. In other words, she is in the same position as an unmarried woman or widow and her husband by a subsequent marriage is in the same position as the husband whom the widow or unmarried woman marries subsequently. So also where a man who has been divorced adopts during the lifetime of the divorced wife and subsequently marries another woman, the latter woman is in the same position as step-mother of the adopted boy. In other words, the position of the divorced man is the same as that of a widower or bachelor. It is also apparent that the spouse divorced before the adoption by the other spouse bears no relation whatsoever to the adopted child. There can be no doubt that the adoption by a divorced woman or man is valid so long as she or he has no issue at the time of the adoption. Nor can there be any doubt that an adoption by either of them of a girl is valid if there is no daughter of the marriage or of a boy if there is no boy of the marriage and there is also no question of any requisite consent for the validity of such adoption from the other spouse. The only alternative to the above position is to hold that in the case of an adoption by a divorced man or woman who has not remarried at the time of the adoption the adopted son will not have an adoptive parent other than the adopter.

15 **Valid adoption not to be cancelled.**—No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person nor can the adopted child renounce his or her status as such and return to the family of his or her

Section 15—Synopsis

1. Valid adoption not to be cancelled.

2. Invalid adoption.

1. **Valid adoption not to be cancelled.**—Adoption is a question of status and its incidence is a matter of law and not of contract. Once a valid adoption is made, the adoptee is deemed to have been born to the adopter, and in the same way as sonship cannot be cancelled by declarations or deed, so also the status which springs from a valid adoption is not a matter that can be subject of bargain or cancellation. Thus if there is a valid adoption neither the fact that the adopter has repudiated the adoption nor the fact that the adoptee has disowned the adopter, would put back the adoptee into the family of his birth so as to enable him to claim the rights in the natural family which he would have but for the adoption. It is also quite correct to say that such conduct on the part of the adopter or adoptee would not operate as a valid renunciation of the rights flowing from the adoption so that if the adopter dies the adopted son is entitled to succeed to him or her as his or her adopted child. A question may arise whether an adopted son cannot renounce his right of succession to the adopter, or *vice versa* whether the adopter cannot renounce his or her right to succeed to the property of the adoptee. This question has to be decided on the principles governing dealings with *spes successionis* and falls within the principle of section 6 (a) of the Transfer of Property Act (*Mst. Gulkandi v. Prahlad*)⁵³

The section is not retrospective in its operation. It applies only to an adoption validly made in accordance with the provisions of Chapter II of the Act. Chapter II deals with the regulation of adoption made after the commencement of the Act. In the context and set up of the section it is difficult to enlarge its scope and permit it to embrace any adoption validly made before the commencement of the Act.⁵⁴ An adoption made in the Goda Datta form made before the passing of this Act can be cancelled or revoked even after the coming into force of this Act.⁵⁵

2. **Invalid adoption.**—This section only provides against the validity of cancellation of a valid status of adoption and not against the legality of cancellations of rights purported to be created under adoptions which are invalid. If, for instance, a document creates rights in a person on the assumption of his being a validly adopted son and such assumption is the reason and motive and condition of the conferment of the rights, and it is found that the adoption is invalid, there is nothing to prevent the adopter or the adoptee providing for cancelling of the adoption and renunciation of the status, and since even without such cancellation the alleged adopted child does not get any right, he cannot lose the right which he has had in the family of his birth before adoption. For instance, if one of the sons in a joint family, is purported to be adopted and the said adoption is invalid for any of invalidating grounds, the adopter and the adoptee can cancel the assumed status and the adoptee will continue to be the member of the joint family of the adopter's birth.

(53) 1968 Raj. 51; L.L.R. (1968) 16 Raj. 1047.

(54) *Dangrejji Pralhadji v. Mahaveji Shri Chandra Prabha*, 1975 S.C. 794.

(55) Ibid affirming 1971 Crj. 108.

16. Presumption as to registered documents relating to adoption.—Whenever any document registered under any law for the time-being in force is produced before any Court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the Court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

Section 16—Synopsis

1. Presumption as to registered documents 2. Court shall presume, relating to adoption.

1 Presumption as to registered documents relating to adoption.—This section provides for certain presumptions being raised with reference to an adoption whenever a registered document is produced before the Court purporting to record an adoption made and is signed by the persons giving the child in adoption. The presumption is not only with reference to the factum of adoption but extends to its validity. But this is a rebuttable presumption and both the factum and validity of an alleged adoption can be proved. But the presumption is not to be made unless the following conditions are complied with: (1) there must be a document, (2) it must be registered under the law in force, (3) it must purport to record an adoption which has taken place, (4) the document must be signed by both the giver and taker of the child in adoption and not by only one of them, and (5) it must be produced before the Court⁵⁶. If any of these ingredients is wanting, the presumption cannot arise. The consent of the giver and taker is intended to be expressed in a document. It cannot be done by separate documents⁵⁷. It is only after the document is signed by the person giving as well as by the person taking the child in adoption that the document has to be presented for registration. Hence the signature of the person presenting the document for registration cannot be regarded as satisfying the requirements of the section⁵⁸. The adoption need not be *in praesenti* contemporaneous with the deed. It may even be a previous adoption to be acknowledged under the document⁵⁹. Where the document is executed by the adoptive parents in favour of the adopted son and the natural father has lent his signature to the document there is sufficient compliance of the requirements of Section 16⁶⁰. The presumption under the section arises only if the adoption deed is executed and registered in the manner specified⁶¹. If the document is not registered or if it is only an agreement to adopt and does not record the fact of adoption either contemporaneously or previously made, or is signed only by the adopter or has not been produced into Court, there is no presumption either of the factum or validity of the adoption.

2. Court shall presume—It is mandatory on the Court to raise the presumption under this section if the conditions mentioned in the section are fulfilled⁶². There is no discretion in the Court in the matter. But this presumption is not an absolute and irrebuttable one, though it should be stuck to till it is displaced by proof. The word “disproved” postulates something

(56) *Id Aftabuddin Khan v. Chanden Bilasini*, 1977 Or.m.a. 69

(57) *Id Aftabuddin Khan v Chanden Bilasini*, *supra*.

(58) *Mahadjo v. Bagwabar*, (1974) 2 Karn. L.J. 174 1975 Karn. 75.

(59) *Shyma Sundar v. Dharindhar*, 1971 (1) C.W.R. 784.

(60) *Ibid*

(61) *Gajjan Singh v. Bachan Singh*, (1972) 74 Punj. L.R. 50.

(62) *Sushil Chandra v. Bhoop Kumar*, 1977 All. 441.

more than mere existence of some evidence to the contrary or mere suspicions against the fact or validity of adoption. It shows the necessity of evidence of a substantial character amounting to proof to the contrary in the sense of the Court being convinced that the presumption is inconsistent with the facts proved or the probabilities established. The mere fact that the parties to the document are illiterate people is no ground for not raising the presumption mentioned in the section (*Baidoo v. Bhardwaj*)⁽⁶³⁾.

The presumption which must be raised under the section is a rebuttable one.⁽⁶⁴⁾ The rule is not one of mere statutory presumption which can be rebutted in the ordinary manner of rebuttal but the presumption has to be dislodged by disproof of the fact.⁽⁶⁵⁾ The burden of proving that no adoption took place and to rebut the presumption under this section is on the party who denies the adoption.⁽⁶⁶⁾ This section does not preclude a party contesting the adoption from relying on the circumstances available from the record quite apart from the evidence of witnesses adduced in support of the factum of adoption in order to rebut the presumption.⁽⁶⁷⁾ Where the deed is challenged on the ground that it was executed under fraud or undue influence and the evidence necessary to be led in respect of an attested document has been tendered, the burden of proving fraud and undue influence lies on the party challenging the document.⁽⁶⁸⁾

17. **Prohibition of certain payments.**—(1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person, and no person shall make or give or agree to make or give to any other person any payment or reward the receipt of which is prohibited by this section.

(2) If any person contravenes the provisions of sub-section (1), he shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

(3) No prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorised by the State Government in this behalf.

NOTES

Prohibition of certain payments—This section prohibits the giving or receiving of any reward or payment in consideration of an adoption or any agreement to give or receive any such payment or reward. The obvious object is to prevent the institution of adoption being made an instrument for bartering children. There is nothing however in the section preventing stipulations for the benefit of the adopted boy or girl. On the other hand such a stipulation would be very necessary in the interests of the adopted child since under the Act the adoption does not divest anybody of property or prevent the adopter from dealing with his or her property. What is sought to be prohibited is the act of prostitution of parenthood for the

(63) 1 L.R. (1968) 2 Funj. 231.

(64) *Madan Singh v. Sajan Kaur*, 1972 Clr. L.J. 218.

(65) *Sitama Sander v. Dhargadhkar*, (1971) 1 C.W.R. 784.

(66) *Kanchada v. Kanchada*, 1973 Orissa 3; see also *Sarman Singh v. Gurdeep Singh*, 1975 Rev. L.R. 136.

(67) *Siddappa v. Channappa*, 1973 Mys. 245.

(68) *Baldev Chandra v. Brij Kishore*, 1977 All. 441.

purpose of making profit by selling away the children unwanted to child-needy persons. The system of adoption envisaged by our ancients was permeated with the best and the noblest of motives which stemmed from the religious instinct of our forbears, and it will be doing a sacrilegious violence to the system to tolerate it to be dragged to the mire of mercenary profit.

Sub-section (2) provides the penalty for contravention of the prohibition enacted in the first clause and says that the contravener will be punishable with imprisonment which may extend to six months or with fine or with both. The law being new, this penal provision if rigorously applied will work undue hardship, and the words "shall be punishable" instead of words "shall be punished" give a margin of discretion to the Court to modulate the punishment having regard to the circumstances of the case and the needs of the times.

Sub-section (3) provides that no prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorised by the State Government in this behalf. This safeguard is necessary because as already said till the public is sufficiently educated and acquainted with the penal provisions of the enactment, the State Government should keep a vigilant watch over its magistracy and see that unnecessary prosecutions are not launched against innocent persons.

CHAPTER III.

MAINTENANCE

18. Maintenance of wife.—(1) Subject to the provisions of this section a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance—

- (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;
- (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;
- (c) if he is suffering from a virulent form of leprosy;
- (d) if he has any other wife living;
- (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;
- (f) if he has ceased to be a Hindu by conversion to another religion;
- (g) if there is any other cause justifying her living separately

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

Section 18—Synopsis

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|---------------------------------|--|
| 1. Scope of the section. | 7. Husband keeping a concubine. |
| 1-A. Maintenance of wife. | 8. Conversion of the husband to some other religion. |
| 2. Separate maintenance of wife | 9. Any other cause justifying her separate living |
| 3. Desertion. | 10. Unchastity of the wife. |
| 4. Cruelty. | 11. Conversion of the wife to another religion. |
| 5. Leprosy. | |
| 6. Existence of another wife. | |

MAINTENANCE

1. *Scope of the section.*—The law of maintenance applicable to the Hindus now is statutory. Chapter III of the Act has codified the law. In respect of all matters dealt with in the Act, it supersedes the earlier law. It is only in so far as there is some express enactment in the Act that it can be said to be exhaustive in regard to such express provision.⁶⁹ There is no inconsistency between the Act and Section 125 of the Criminal Procedure Code, 1973 (formerly Section 488 of the 1898 Code),⁷⁰ and Section 18 does not stand in the way of a Magistrate granting relief under Section 125 of the Code.⁷¹ The section does not entitle a woman to claim maintenance from a person with whom she entered into a void marriage.⁷² The wife's right to maintenance flows from this section and it is not a right under the Civil Procedure Code.⁷³ The section does not amend or abrogate the provisions of Section 10, Hindu Marriage Act.⁷⁴ In law a woman can be given recognition either as the wife of a man or as his concubine and there cannot be an intermediary class picturesquely described as an "illegitimate wife."⁷⁵ The only forum available to the wife to enforce her right to maintenance under Section 18 is to have recourse to the civil Court.⁷⁶

1-A. *Maintenance of wife.*—The wife's right to maintenance is an incident of the status of matrimony and once the relationship of husband and wife is established the wife gets maintenance as a matter of course.⁷⁷ So long as the husband is living she is not a dependant within the meaning of Section 21.⁷⁸ It is a personal obligation not dependent on the possession of property by the husband, though the means of the husband and his assets may well be considered in the determination of the quantum of maintenance to be awarded

(69) *Krishna Medhas v. Padmalabai*, 1977 Mah. L.J. 402.

(70) *Nanak Chand v. Gander Kishore*, 1970 S.C. 446; *Babu Lal v. Ram Rati*, 1968 All. L.J. 756.

(71) *Ram Singh v. State*, 1963 All. 285; *Ajit Singh v. Jassant Kaur*, 1963 Cur. L.J. 561 (Punjab).

(72) *Bendishar v. Chahal*, 1967 Pat. 277; *Neelaprasanna Reddy v. Padmanabham*, (1966) 1 M.L.J. 329; 79 L.W. 231; 1965 Mad. 394.

(73) *Shankara Gouda v. Bharathi*, I.L.R. (1975) Kann. 322; 1975 Kara. 17.

(74) *Rohit Kumbhari v. Narendra Singh*, (1972) 1 S.C.J. 487; 1972 S.C. 439.

(75) *Naraya Chittler v. Achyuta Jural*, (1975) 1 M.L.J. 142; 1975 Mad. 202.

(76) *Krishnan Lal v. Sundarban Kumari*, 1978 Rev. L.R. 81; (1978) 80 Punjab L.R. 147.

(77) *Gandhi v. Tarini*, 1960 Cal. 305. See also *Satyanarayanadas v. Jagannath*, 1962 A.P. 439; *Jagat Krishna Das v. Ajit Kumar Das*, 1961 Orissa 75; *Udayasankh Sarad v. Sri Devi*, 1973 O. 100; *Medanand v. Raju*, (1976) 2 M.L.J. 74; 89 L.W. 688; 1990 Mad. 100; *Babu Singh Krishna Kumar v. Parashambh*, 1976 A.P. 863.

(78) *Udayasankh Sarad v. Sri Devi*, supra.

in any particular case. The first clause enunciates this personal obligation to maintain the wife so long as she lives with him. It should be observed that the fact that she is not leading a life of chastity and virtue while living with the husband is not a ground for her husband refusing to maintain the wife, though if she lives separately in immoral relations with another she is not entitled to claim separate maintenance from the husband under Clause 3 of this section. This clause does not say what will be the nature of the maintenance that is to be awarded to the wife if she is leading an immoral life and cannot be controlled by the husband into moral ways while she is living in his house. No Court will give her the same standard of maintenance allowance as she will be entitled to if she adheres to a moral life and is faithful to her husband. The ancient texts would prescribe what is known as starving maintenance for such misconducting wife, but this injunction would hardly be respected by the modern Courts who however would not allow her any maintenance on a very munificent scale even in a case where the husband could well afford it. What is to be noticed under this clause is that the liability of the husband to maintain the wife who is living with him is statutorily declared without any exception being made in the case of her unchastity except that under Clause 3 of this section she cannot claim separate maintenance when she is unchaste. The grounds of claim for separate maintenance of the wife are enumerated in the next Sub-section (2). On the question of award of interim maintenance to the wife pending a suit under Section 18, judicial opinion is not uniform though by and large the Court is held to have power to grant the same.⁷⁹ There is a discretion in the Court before which a suit for separate maintenance of the wife is pending to award interim maintenance to the wife where the relationship of husband and wife is admitted and there is a *prima facie* ground for separate maintenance as for instance, when the husband had taken another wife (*Ra-hi-ram v. Ramkali*).⁸⁰ The fact that the wife refuses to live with the husband on the ground that he had taken another wife does not constitute desertion by the wife so as to justify deprivation of the wife of her right to separate maintenance *Mallappa v. Mallappa*.⁸¹

Where a person who has his wife living marries again after the commencement of the Hindu Marriage Act, though such marriage is void, the second wife can claim maintenance against him.⁸²

This Act has not made any provision regarding the maintenance of a coparcener's wife out of the joint family property. The statutory right under Section 18 is available only to

(79) *Inder Mal v. Babu Lal*, 1977 Raj 160; *Dhanrajammal Udayar v. Raja Rani Ammal*, (1973) 1 M.L.J. 383; 1973 Mad. 969 [power to grant is implicit and ancillary to power to entertain suit for maintenance]; *Shankar Gouda v. Bhayathi*, I.L.R. (1975) Karn. 302; 1975 Karn. 17, *Jyoti Prakash v. Chempati*, 73 Cal. W.N. 332; 1975 Cal. 260; *Sukhdoo Singh v. Sham Kaur*, (1972) 74 Punj L.R. 850 (if there is general right to claim maintenance under the statute it follows that interim maintenance can be granted where relationship is undisputed); See also *Tarjal v. Gauri*, 1968 Cal. 567; *Ramachandra Bahara v. Subhalata Devi*, 1977 Orissa 96 [in extraordinary cases, Court can exercise inherent power]; *Appanna v. Senthammal*, (1971) 2 A.P.L.J. 330; 1972 A.P. 62 [no statutory authority to grant interim maintenance where the right to maintenance is disputed], *Sodagar Singh v. Harbhajan Kaur*, (1977) 79 Punj. L.R. 506; *Ramachandra Bahara v. Subhalata Devi*, supra [no power under S. 18 to award interim maintenance].

(80) 1970 M.P.L.J. (Notes) 20. *C. Tarjal v. Gauri*, supra, [denial of case by defendant is immaterial].

(81) 1970 Mys. 59.

(82) *Ganga Reddy v. P.T. Lakshmanan*, (1975) 2 A.P.L.J. 37. Cf. however *Nagesh Chettiar v. Achinagar Amma*, (1975) 1 M.L.J. 142; 1975 Mad 202.

the wife against her husband whether he has or has not any property. The principles of the old Hindu Law continue to apply in respect of the wife of a coparcener to be maintained out of the joint family property and the claim has to be enforced under the old Hindu Law and not under this Act.⁸⁸

2. Separate maintenance.—Clause 2 of this section (corresponding to the former Section 2 of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 which was substantially the same as Section 18 (2) of this Act)⁸⁹ provides for cases where the wife is entitled to live separately from her husband without forfeiting her claim to maintenance. There are seven grounds mentioned which justify the wife in her claim for separate maintenance and these are (a) husband's desertion, (b) this cruelty, (c) his suffering from a virulent form of leprosy, (d) existence of another wife, (e) his keeping a concubine, (f) his conversion to another religion, (g) any other cause which justifies her separate living. Ordinarily when a wife lives away from her husband for no justifiable reason and without his consent and against his wish, the wife will not be entitled to claim maintenance. This clause merely says down that the wife does not forfeit her claim to be separately maintained if she has any of the grounds for separate living mentioned in this clause. This clause does not say that if the wife lives separately from her husband and cannot urge any of the grounds mentioned in this clause she does or does not forfeit her claim to separate maintenance. Clause 3 which provides for her not being entitled to separate maintenance mentions only two grounds, namely, her unchastity and her conversion to another religion. For a case which does not fall under any of the specific grounds in Clause 2 or Clause 3 the matter is to be found in the discretion of the Court to award suitable maintenance dependent upon the circumstances of the particular case.

3. Desertion.—Clause (2) (a) of this section provides for separate maintenance being awarded to the wife who has been deserted by her husband, that is to say, abandoned by him without reasonable cause and without her consent or against her wish or wilfully neglecting her. What amounts to desertion has been considered in the commentaries under the Hindu Marriage Act. Cases have held that there can be desertion by the husband even though the wife and the husband are living in the same house, and that there can be no desertion if the husband has reasonable cause for leaving the wife. If he has justification to leave her company, the fact that he has left her without her consent or against her wish would not affect the question so as to convert what is a justifiable leaving into blameworthy forsaking. So also wilful neglect of the wife by the husband will also be desertion though all along the husband and wife are living in the same premises. This wilful neglect embraces not only neglect to maintain her in the matter of providing her with food, raiment and shelter, but also the marital cohabitation and consortium to which the wife is entitled in law from her husband. For a fuller discussion as to what amounts to desertion see the commentaries under Sections 9, 10 and 13 of the Hindu Marriage Act.

4. Cruelty.—The second ground for the wife living away from her husband and claiming maintenance during such separate living is cruelty. This cruelty includes both physical cruelty such as battery and beating but also mental cruelty such as by words of insult and humiliation. It is well-known that the tongue pierces more deeply than the sword,

(88) *Evilam v. Padmalathi*, 1977 Mah. L.J. 402.

(89) *Kadappi Sulu v. Arimasth Dasi*, 1971 Orissa 295.

and many have been cases of suicide by the wife who unable to bear the cruel words spoken by the husband has preferred a watery grave or the swinging oblivion of the rope. Saneer women could choose a life of separation and compel the husband to pay the penalty for the cruelty by paying the separate maintenance of the wife. In every case of alleged cruelty the test laid down is what is laid down in effect in this definition in sub-clause (b), namely that she has been treated with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband. The reasonable apprehension is the reasonable apprehension of the particular woman in question. The Court has to place itself in her position and consider whether given the surrounding circumstances in which she is placed the apprehension to the effect mentioned would be reasonable. No doubt similar treatment to a woman of more robust physical or mental make-up or to one who is too thickskinned and insensible may create no apprehension at all, and most women are generally very patient and do not mind harsh and even violent treatment if they are few and far between. But if outbursts of temper and violence become the order of the day and are systematically indulged in, the limit of human patience and forbearance may well be reached, and the woman may well be reasonably disposed to conclude that further putting up with the treatment of the husband would undermine her health or physical or mental well-being and that she must get away from him.

The test of reasonableness should be correlated to the conditions and circumstances of the particular wife in question and not some other woman circumstanced differently with different status, environment and upbringing.

In determining what constitutes cruelty regard must be had to the circumstances of each particular case keeping in view the physical and mental condition of the parties and their character and social status. Any conduct of the husband causing disgrace to the wife or subjecting her to a course of annoyance and indignity amounts to cruelty.⁸⁵ Husband's taking to drinking by itself would not entitle the wife to separate residence and maintenance.⁸⁶ It is no answer to a charge of cruelty made by the wife for her husband to say that he himself was not guilty of any acts of cruelty but it is his mother who was so guilty. A wife is entitled to insist that she should not be exposed to the unpleasantness of the relatives of her husband and that suitable provision should be made for her to live with her husband in privacy.⁸⁷

5. *Leprosy*.—This is the third ground of justification for the wife living away from the husband and claiming separate maintenance. Any disease other than leprosy does not fall under this ground, and even mere affliction of leprosy will not do. Leprosy to be a ground for separate maintenance must be of a virulent type in the sense of a repulsive character making the man afflicted unfit for social intercourse. To compel a wife to be in his company is abhorrent to anybody and hence is this provision made. It may well be asked who is to protect and sustain him if not his wife. The Legislature does not answer the question but does not prevent the wife from living with him if she is so minded and does choose to follow the examples of puranic ladies who merged themselves in the personality of the husband. See also the discussion under this question in the Hindu Marriage Act, Sections 10 and 13.

(85) *Kapash Sahi v. Armani Dasi*, 1971 (1) C.W.R. 343; 1971

(86) *Sahni Dal v. Sahni*, 1974 (1) C.W.R. 550.

6. *Existence of another wife.*—If the husband has another wife living then that would be a ground for claiming separate maintenance. It does not matter whether that wife was married before or after the wife claiming maintenance. *Kies Bala v. Bankis Chandra*⁸⁷ nor does it matter that that wife is living or not living with the husband. *Kalavoti v. Rattan Chand*.⁸⁸ Where B was the first wife and C the second of A, B's claim of separate maintenance will accrue only if the second marriage between A and C was valid.⁸⁹ It is for the plaintiff to establish the identity of the second wife and the actual proof of the marriage with all the legal formalities.⁹⁰ When the wife chooses to live separately under Section 18 (2) (d) in the circumstances mentioned there she would be entitled to maintenance from the husband. He could not compel her to return to him so long as his marriage with the other wife is not dissolved, but if the marriage is dissolved the husband can call upon the wife to return to him and if she does not return it is very doubtful if she can still claim maintenance from him under Section 18. This section does not amend or abrogate the provisions of Section 10 of the Hindu Marriage Act.⁹¹ Where the husband had already married twice before the said Act, in such a case both the wives can claim separate maintenance from the husband under Clause (d) of Sub-section (2). The wife living here means a wife under a valid marriage which is subsisting at the time and not a marriage which is void or under a marriage which has been dissolved by a decree of divorce. The wife of a voidable marriage coming under section 12 of the Hindu Marriage Act would come under this clause so long as that marriage has not been avoided by a decree of nullity. Supposing the wife deserted the husband and the husband married again before the Hindu Marriage Act came into force. Can the wife who had deserted the husband claim maintenance under this clause on the ground that the husband's second wife is living? Again can the second wife also choose to go away from the husband and claim separate maintenance on the ground that the deserted wife is living? On the wording of the clause both the questions admit of only one answer, namely, an answer in the affirmative. There is no doubt that the lot of the man who has to live with two wives together is anything but enviable, and probably it is to his own good that the Legislature should enable one of them to lighten his load of wifedom. But why should the Legislature enact a provision like this which might leave him in many cases in these modern days of the independence of the finer sex in the pitiable position of wifelessness at the same time with the liability of maintaining two wives saddled on him? *Satyamareyana v. Seetha Rammamma*.⁹² Some kind of an answer is laboriously attempted by the Madras High Court in the decision reported as *Annammal Mudaliar v. Perumaye Ammal*,⁹³ by adding the words "with him" to the words "any other wife living". In other words, the interpretation of the clause according to this decision is that when a man has two or more wives legally married at a time when polygamous marriages were allowed by law and those marriages are still subsisting after this Act, one of the wives will be entitled to ask for separate maintenance

(87) 1967 Cal 603.

(88) 1960 All 601.

(89) *Saraswathamma v. Bhadramma*, 1970 Mys 137.(90) *Fahie v. Nohia Dei*, 1975 (1) C.W.R. 218.(91) *Rohini Kumari v. Naranda Singh*, (1972) 1 S.C.J. 487, 1972 S.C. 459.

(92) 1963 A.P. 270 (F.B.).

(93) 1965 Mad. 139; I.L.R. (1964) 1 Mad. 845.

and live separately from the husband if he happens to live with one of the other wives. According to a third interpretation, if none of the wives is living with him, no wife can ask for separate maintenance, even though the husband is having a number of wives at the time.

The words "any other wife living" in Clause (d) include any wife other than the wife claiming relief. *Narayanamma v. Narasaraaju*.⁹⁴ Where the wife claims separate maintenance on the ground of the husband's second marriage, she is entitled to claim it only from the date of the commencement of this Act: *Shyam Sunder v. Shastamani*.⁹⁵, *Narayanamma v. Narasaraaju*.⁹⁶

In *Satyamanyama v. Sesharamma*,⁹⁷ it is held that though under the Hindu Married Women's Rights to Separate Residence and Maintenance Act (XIX of 1946), a wife is not entitled to separate maintenance on the ground of the husband's second marriage unless it had taken place subsequent to that Act, yet under the provisions of this section she will be entitled to reside separately without forfeiting her right to maintenance if there is another wife living irrespective of the time when the latter's marriage had taken place. This is perfectly correct on the language of Clause (d) of sub-section (2).

Where the husband had another wife and he offered to the plaintiff a residence in his village, the offer does not affect the plaintiff-wife's right to live separately and claim maintenance. At best it may disentitle the wife to claim rent for separate residence but her right to maintenance remains unaffected.⁹⁸

7. Husband keeping a concubine—The fifth ground which justifies the wife in demanding separate maintenance is the husband keeping a concubine either in the same house in which the wife is living or elsewhere but residing with the concubine habitually. Keeping a concubine in the same house in which the wife is living and showering his affection on the concubine in the very presence of the wife, is a type of cruelty of the husband which it is not expected that any normal woman would put up with, and it is, therefore, legitimate that that should be made a ground for claiming separate maintenance. As regards the case of the husband keeping a concubine elsewhere, the clause imposes an additional condition that the husband should be residing with the concubine habitually. The expression "habitually" implies and indicates that the husband has made it part of his regular life to go and reside with the concubine. Mere occasional lapses of the husband from moral conduct by resort to the company of concubines may not constitute a sufficient ground for separate maintenance. By the expression "habitually resides" in section 18 (2) (c) the emphasis is on the habit and not on the residence. If the husband brings the concubine to his house where his wife is living the first part of the clause in full force applies but where he keeps her outside the second part should always apply. It is not necessary to show that the husband has changed his permanent place of residence. It would be enough if it is shown that there is a consistent course of conduct, spread over a time indicating that the husband has kept a mistress exclusively to himself and visits her regularly. That would answer the husband's habitual residence elsewhere.

(94) (1962) 1 Andh. W.R. 180.

(95) 1962 Orissa 50.

(96) *Supra*.

(97) (1963) 1 An. W.R. 1 (F.R.).

(98) *Chow v. Chaudhary*, 1965 M.P.L.J. (Notes) 9.

Change of usual place of residence is not therefore germane to find out whether the wife is entitled to separate residence.¹⁰ It must be observed that if the wife is entitled to claim separate maintenance on the ground here mentioned, that right is not suspended or put an end to merely because the husband sends away the concubine from the house or the concubine herself deserts the paramour and goes away, and the husband who has given his wife cause for separate maintenance will not be allowed to say that he has since reformed himself and is leading a life of morality and virtue and that the separate maintenance awarded to the wife on the ground of his keeping a concubine under this clause should not be continued further in view of his change of life into moral ways.

It is not necessary that the pleadings should contain the express words of the ground alleged for relief under Section 18 (2) (e) when all facts are known to the parties and they knowingly join issue.¹¹

3. **Conversion of the husband to some other religion.**—The apostasy of the husband by embracing some other religion which does not fall under the comprehensive definition of Hinduism including Buddhism, Jainism and Sikh religion is a good ground for the wife living separate from husband and claiming maintenance from him during such separate living. It must be remembered that conversion to another religion does not sunder the marriage bond, though it furnishes a good ground for dissolution of the marriage by a decree of divorce. It must also be remembered that conversion by itself does not prevent the spouse of the convert from living with him. But this clause gives the wife of the convert liberty to go away from him and claim separate maintenance. The fact that after the wife has claimed and obtained separate maintenance on the ground of the conversion of the husband, the husband becomes reconverted to Hinduism does not disable her from continuing to claim separate maintenance, because the clause says that on the husband ceasing to be a Hindu the right to separate maintenance comes into being, and there is no provision in the clause for that right ceasing to continue by any subsequent event, be it reconversion or any other. It ought not to be forgotten that conversion to operate as such in law for the purpose of this provision is not a mere conversion in spirit or sympathy but a conversion by some overt act, or ceremony with which formal conversion is associated and accompanied. What acts or ceremonies would be necessary or sufficient for a particular conversion from Hinduism to some other religion such as Islam or Christianity would depend upon the practices and precepts of the particular religion into which the Hindu husband is affiliated. If the requisite ceremonies of the particular religion into which the Hindu husband is alleged to have been converted are not shown to have been gone through but what is proved is merely that he has expressed agreement or admiration for the tenets of that religion that would not be sufficient to constitute conversion to some other religion so as to enable the wife to claim separate maintenance under this clause. It is worthy of note, however, that this clause does not prevent the spouses from continuing to live together as husband and wife with all the rights and obligations thereof, because conversion of one of the spouses does not *ipso facto* operate as a dissolution of the marriage, and there is nothing in law or commonsense to prevent two persons belonging to different religions coming together in matrimony and living in peace and harmony, each respecting the other's religion and practices. If two persons belonging to different religions can become husband and wife under the Civil Marriage Act, what is there unnatural or

(10) *Amarendra v. Marudham*, 1974 148 P. L. J. 284.

(11) *Id.*

unreasonable in two persons who were formerly Hindus and got married to each other continuing to live as husband and wife even after one of them has forsaken the Hindu religion? Nor is there anything abhorrent to moral or religious sense if the husband who has become a convert to Islam or Christianity in a moment of weakness, with the consequence of his Hindu wife forsaking his home subsequently repenting of his hasty action and getting himself reconverted to the Hindu faith inviting his wife to resume their conjugal life and the wife assenting to such a course. No doubt the husband has no right to require the wife to come and live with him and to claim absolution from his liability to the wife's separate maintenance on the ground of his reconversion into the Hindu fold. This is all that this clause is designed to prescribe and cannot be construed as a prohibition from the spouses continuing or resuming their marital cohabitation so long as there is no dissolution of marriage on the ground of conversion.

9. **Any other cause justifying her separate living.**—Under this clause are sought to be brought in all other grounds for lawful separate living which cannot strictly be brought under any other previous clause. What these causes are and how far they will justify the Court in awarding separate maintenance against the husband are matters left to the judicial discretion of the Court to be exercised in accordance with the principles of justice and equity, principles which cannot be defined by rules of thumb or well-established precepts. The question that the Court has to address itself in each case where this clause is sought to be pressed into service on behalf of a wife is this; do the facts proved justify the wife living away from her husband and claiming separate maintenance. In answering the question, a broad commonsense attitude should be taken and not one which attaches too much importance to modern and sensitive sentiments of women who have of late developed somewhat of a masculine outlook almost on the lines of unsexing themselves. Many modern women do not like to be tied to their homes and they want freedom which often oversteps the limits of decency. Such mentality does not always find a sympathetic response in the attitude of the husbands with the result that difference arises and ends in the break-up of the home which ought to be happy and harmonious with a little more give and take on either side. If a wife rushes to Court with a suit for separate maintenance, the Courts are not going to be too ready to grant it unless coupled with such trifling differences there are graver charges of moral delinquency on the part of the husband which no wife can be asked or expected to put up with. This clause really vests a residuary discretion to order separate maintenance in respect of cases which do not fall under any of the previous clauses and will operate as a salutary check on the husbands against their misconduct to their wives. But this provision ought not to be allowed to be made an easy and convenient handle for every disgruntled wife to resort to the Court on every pretext or trifling grievance and claim separate maintenance. What are the causes that can justify either spouse living away from the other are found elaborately discussed under the relevant provisions of the Hindu Marriage Act to which reference can usefully be made. All the cases that may come under this clause if carefully considered and analysed on principle will be found to fall under a category analogous to cruelty to the wife, almost approaching it but not quite amounting to it. They almost touch the fringe of cruelty and while they may not satisfy the test of cruelty mentioned in this section they will be found to be cases where not to award separate maintenance will practically drive the wife into a life of misery and suffering.

The expression "any other cause justifying her living separately" would, it is conceived, take in a case where the wife's residence in the husband's home is rendered miserable by reason of the existence of his relations like his mother or sister, or others, between whom and

the wife there has been no love lost, and for reasons easily imaginable the wife is justified in seeking to live away from such a home. This expression will also comprehend a case where the husband by his addiction to drugs and drinks often indulges in acts which no decent woman would put up with. Such and similar instances justifying the wife living away from the husband and asking for separate maintenance can easily be conceived. The Legislature deliberately uses this elastic expression so that there may be a large margin of judicial discretion vested in the Court which may be moulded to suit the circumstances of any particular case.

10. Unchastity of the wife.—Sub-section (3) of section 18 provides that a Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be Hindu by conversion to another religion. Taking the ground of unchastity alone, it must be observed that what this section provides for is the absence of a right in the case of an unchaste wife to claim separate residence and maintenance from her husband. The section does not provide that the husband is under no liability to maintain his unchaste wife if she continues to live with him. The absence of such provision, however, does not mean that a wife is entitled to claim maintenance from the husband even though she is unchaste and refuses to budge from the husband's home. There are cases where even though the wife may be of loose morals the husband is not either able or willing to shake himself off from her. In such a case the husband is bound to maintain her, in the house in which he and she are living. There may also be cases where the wife having lived a life of shame and immorality, repents and returns to the husband. In such a case if the husband is willing to condone her past conduct, he cannot be allowed to deny her maintenance altogether. The old texts laid down that in the case of repentant wife who had been led astray but who returned in remorse, she should be given what is called "starving maintenance". It is difficult nowadays to subscribe to this view; but there is no denying the position that no Court will compel the husband to treat such a wife in the same position, giving her the same comforts and luxury of life as he will be expected to give her if she had continued to be true and faithful to him. What this sub-section lays down is merely that unchastity is a ground of disqualification for a wife claiming separate residence and maintenance from her husband. It should be remembered in this connection that the section uses the present tense namely in "if she is unchaste," that is, the fact that she might have been unchaste long time back which unchastity had been condoned by the husband subsequently would not disqualify her from claiming separate maintenance if she can otherwise come under any of the provisions enacted in this section, which would give her the right to claim separate maintenance. In other words, the husband's condonation of the wife's unchastity wipes out her disqualification and she is to be considered as one who had never gone astray for the purpose of claiming separate maintenance if otherwise she is entitled to it.

11. Conversion of the wife to another religion.—If after marriage the wife becomes converted to some other religion such as Mahomedanism or Christianity, she forfeits her right to claim separate maintenance from the husband. But for the conversion, in the circumstances of any particular case she may have excellent grounds for claiming separate maintenance. The expression "conversion" here does not mean a conversion by a Hindu to Buddhism or Jainism or the Sikh religion or the conversion of an adherent of any of these faiths to another of such faiths, because the expression "Hindu" in this provision should be read in a comprehensive sense of a person who belongs to the Hindu, Buddhist, Jain or Sikh religion. It should be observed here that the disqualification to claim separate maintenance attaches

to the wife the moment she ceases to be a Hindu by conversion to another religion. An interesting question may arise whether a Hindu wife who had been getting separate maintenance for any of the reasons given in the sub-clauses of sub-section (2) of this section and who becomes disentitled to claim such maintenance on ceasing to be a Hindu by conversion to another religion, can again claim that right by becoming reconverted to Hinduism from the new religion to which she had temporarily transferred her fealty. The answer appears to be in the negative. The section provides for the final determination of the right to claim maintenance in the event of a conversion, and not for a mere suspension of that right with the possibility of its revival on reconversion. It should also be observed that the expression "conversion" as used in the sub-section does not mean a mere admiration or approval for the tenets of another religion, but means a positive act of conversion by observing and undergoing the forms of ceremony prescribed by the new religion to which the Hindu wife is alleged to have become converted. Mere attendance at the Christian Churches to hear the sermons delivered or at the Mahomedan mosques where prayers are offered will not be sufficient to constitute "conversion" required under this sub-section because such attendance may be due merely to the avidity to learn about other religions and their practices and does not necessarily imply or import a breaking away from the Hindu faith in which she was born.

19 Maintenance of widowed daughter-in-law.—(1) A Hindu wife whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law:

Provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance—

- (a) from the estate of her husband or her father or mother, or
- (b) from her son or daughter any or his or her estate.

(2) Any obligation under sub-section (1) shall not be enforceable if the father-in-law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and any such obligation shall cease on the re-marriage of the daughter-in-law.

Section 19—Synopsis.

- | | |
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| 1. Maintenance of widowed daughter-in-law. | his or her estate. |
| 2. Widowed daughter-in-law in possession of her own property | 5. Non-liability of the father-in-law if he has no coparcenary property. |
| 3. Maintenance from the estate of husband or father or mother. | 6. Cessation of father-in-law's obligation on her remarriage |
| 4. Maintenance from the son or daughter or | |

1. Maintenance of widowed daughter-in-law.—This section governs the rights of a widowed daughter-in-law to maintenance after its enactment.¹⁰¹ Sub-section (1) applies to the case of a widowed daughter-in-law governed by the Dayabhaga and sub-section (2) con-

(101) *Raj Bai v. Jagannath Rao*, (1900) 2 S.C.J. 794; (1900) 3 S.C.R. 799; 1900 S.C. 1110.

templates the case of a Hindu governed by the Mitakshara school¹⁰². The section lays down the provision for the maintenance of the widowed daughter-in-law by the father-in-law and the conditions under which the right may be claimed. This right is available to a woman whose marriage took place before or after this Act, but cannot be claimed—

- (a) if she is able to maintain herself out of her own earnings or other property,
- (b) if she is able to obtain maintenance from the estate of her husband,
- (c) if she is able to obtain maintenance from the estate of her father,
- (d) if she is able to obtain maintenance from the estate of her mother,
- (e) if she is able to obtain maintenance from her son
- (f) if she is able to obtain maintenance from her daughter,
- (g) if she is able to obtain maintenance from the estate of the son or daughter,
- (h) if the father-in-law has no coparcenary property in his possession out of which she has not obtained a share.
- (i) if she has remarried.

2. **Widowed daughter-in-law in possession of her own property.**—A widowed daughter-in-law is not entitled to claim maintenance from her father-in-law if she has sufficient earnings or other property of her own from which she can maintain herself in decent comfort consistent with her station in life. If her earnings or her own property cannot be said to be sufficient for her maintenance, then to the extent of the insufficiency of such means she can look to her father-in-law to supplement her own means, provided of course she satisfies the other conditions mentioned above.

3. **Maintenance from the estate of husband or father or mother.**—Clause (a) of the proviso to sub-section (1) of section 19 says that a widowed daughter-in-law is not entitled to claim maintenance from her father-in-law if she is able to obtain maintenance from the estate of her husband or father or mother. Even here if this source of maintenance is insufficient she can look to her father-in-law to supplement the deficiency if other conditions are fulfilled. What is important to observe here is that the liability of the father-in-law here laid down comes only when the liability of the estate of the husband or the father or the mother cannot be effective either wholly or in part. If it is to be assumed that the normal requirement of the woman would come to Rs. 100 per month, and the estate of the husband or the father or the mother can meet the whole of this allowance, she cannot claim anything from her father-in-law. But if the estate of the husband or the father or the mother can contribute only Rs. 80 per month, then she can look to the father-in-law to contribute the balance of Rs. 20. It must be remembered that she is an heir to the husband, father and mother under the Hindu Succession Act, and if she inherits the estate of the husband, or the father or the mother, either alone or along with other heirs, and what she gets as an heir by inheritance to any of them is more than sufficient to meet her maintenance, then this right against the father-in-law is not enforceable. If she inherits the estates of the father and husband and mother and they put together are sufficient to yield enough income to meet her maintenance, even though each of the estates by itself may not be sufficient to give her enough income to meet her maintenance, even then she is not entitled to claim any maintenance from her father-in-law. But if all the estates put

(102) *Kamini v. Pogrekar*, 52 Cal. W.N. 1126.

together do not give her sufficient income for her maintenance, then she can call upon the father-in-law to supplement it if she is otherwise qualified to claim it.

4. Maintenance from the son or daughter or his or her estate.—The daughter-in-law's maintenance is not claimable from her father-in-law if she can get maintenance from her son or daughter or his or her estate. It must be remembered that the mother is the heir of the son and daughter and if she happens to be daughter-in-law of another, that does not enable her to get maintenance from her father-in-law so long as she is maintained by her son or daughter or out of his or her estate. If the daughter-in-law has inherited to her son or her daughter and the estate thus inherited is sufficiently yielding in income to meet her maintenance, the liability of the father-in-law does not arise.

5. Non-liability of the father-in-law if he has no coparcenary property.—Section 19 (2) shows two conditions precedent for the liability of the father-in-law to maintain his widowed daughter-in-law: (1) his means to pay from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and (2) her remaining unmarried. In other words, in either of the events, of the remarriage or the daughter-in-law factually obtaining a share in the coparcenary properties on a partition the liability of the father-in-law will cease. So long as there is no such partition and the widow does not remarry the obligation subsists.¹⁰³ The obligation is not a personal one or one which can be enforced if the father-in-law is possessed of only his own self-acquisitions. Even if he is in possession of coparcenary property, if she has obtained any share in it as representing her husband or her deceased son, she is not entitled to claim the right. Further the fact that she has not obtained any share in that property would not enable her to enforce the obligation if the father-in-law has not the means to maintain her out of the coparcenary property on account of its meagreness.

Under the proviso to Section 19 (1) to the extent the daughter-in-law is unable to maintain herself out of her own earnings or properties or from the estate of her husband, her father or mother or son or daughter, the father-in-law is liable to maintain her. The reference in the proviso to obtaining maintenance from the estate of the husband etc. is a reference to maintenance provided under Section 22. Thus her earnings or owning property or obtaining maintenance under Section 22 has to be taken into account in fixing the quantum of liability of the father-in-law under Section 19. This is further conditioned on his means to do so from any coparcenary property in his possession under the proviso to Section 19 (1).¹⁰⁴

Where the father-in-law is in possession of self-acquired and ancestral property, and the income from the self-acquired property will be sufficient for his maintenance and that of his wife, the daughter-in-law is entitled to claim reasonable maintenance from the ancestral property without the quantum of such maintenance being curtailed by burdening the ancestral property with the maintenance of the father-in-law and his wife or the maintenance of any other member of the father-in-law's family: *Jai Kaur v. Pata Singh*.¹⁰⁵

(103) *Lalmeta v. Gaudharamal*, (1977) 2 M.L.J. 379; 1977 Mad. 372.

(104) *Ibid.*

(105) 1961 Pwaj. 21; I.L.R. (1961) 2 Pwaj. 151.

The term coparcenary property in Section 19 (2) means the property consisting of ancestral property, joint acquisitions, property thrown into common stock and accretions to such property.¹⁰⁶

6. Cessation of father-in-law's obligation on her re-marriage.—Such obligation of the father-in-law to maintain the daughter-in-law as has been prescribed under this section is not to be enforceable if the daughter-in-law re-marries.¹⁰⁷ By her re-marriage she becomes affiliated to another family altogether and she ceases to belong to the family to which the coparcenary property out of which the father-in-law's obligation is to be enforced belongs.

20. Maintenance of children and aged parents.—(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation.—In this section "parent" includes a childless step-mother.

Section 20—Synopsis

- 1 Maintenance of children and aged parents.
- 2 Scope of the section
- 3 Miscellaneous

1. Maintenance of children and aged parents.—Under this section, a Hindu is under a legal obligation to maintain his legitimate or illegitimate children or his in, aged or infirm parents whether he possesses any property or not. The obligation to maintain these relations is personal and legal in character and arises from the very existence of the relationship between the parties.¹⁰⁸ This section is a virtual reproduction of the old law laid down by the Smritikars with reference to the personal obligation to maintain minor children and aged parents who cannot maintain themselves out of their own earnings or property. The changes introduced are that in addition to the son, the daughter also is placed under the personal obligation to maintain the aged or infirm parents, and the mother to maintain infant children and the inclusion of the step-mother as a parent *utero* the step-son or step-daughter is under a liability to maintain. The child entitled to be maintained by the parent includes an illegitimate child whether it is a daughter or a son. The section provides that the obligation of the parent to maintain the son or daughter extends upto the attainment of the majority by the son or daughter. In the case of a daughter, the personal obligation of the father or the mother to maintain her does not con-

(106) *Kapur Kaur v. Kishan Singh*, 1970 Punj 270; *Curdip Kaur v. Chander Singh*, 1963 Punj. 238 (F.B.).

(107) *Arjunan v. Gaudinmal*, 1977 Mad. 372 [Her right to maintenance ceases, though her right to a share of the separate and self-acquired property as well as the interest in coparcenary property of her husband is not liable to be divested on her remarriage].

(108) *Nand Chand v. Chander Kishan*, 1908 Delhi 238; 60 Punj. L.R. 453; *State Sape Eshwar Kaur v. Parvatisani*, (1979) 1 A.J.L.J. 238; 2000 A.B. 365.

time after her marriage, because after that even the burden of her maintenance is shifted to her husband. Further the liability of the parent to maintain either his or her legitimate or illegitimate daughter is not enforceable after the son or daughter is able to maintain himself or herself out of his or her own earnings or other property. So also the obligation of a son or daughter to maintain his or her aged or infirm parent cannot be enforced if the parent is able to maintain himself or herself out of his or her own earnings or other property. See *Mst Shamu Bai v. Shaji Magarwal*.¹⁰⁹

In *Nanak Chand v. Chandra Kishore*,¹¹⁰ the Supreme Court held that the words "child unable to maintain itself" in section 468 of the Criminal Procedure Code, would include an adult child unable to maintain itself and that the provision is not repealed by this Act. In *Wall Ram v. Smt. Mukhriar Kaur*,¹¹¹ it was held that an unmarried daughter who is unable to maintain herself is entitled to maintenance from the father irrespective of her having attained majority. The liability has no relation to her age. This countenances an exception to the termination of the liability of the father to maintain his minor children enacted in clause 2 of Section 20. The further observation of the Court in the case that the burden of proving with reference to the ability or otherwise to maintain herself is on the father and not on the unmarried daughter who has attained majority is open to question. No presumption can be made that a college going girl is capable of maintaining herself.¹¹² The existence of a step-mother when the natural mother is alive and living separately is a good reason for a daughter to live apart from her father and the latter cannot repudiate his obligation to pay maintenance on that ground.¹¹³

In *Mst Shambu Bai v. Magan Lal*¹¹⁴ it is held that there is nothing in this section or any other section of this Act which militates against the right of the mother under the ordinary Hindu Law to claim a share at the partition between her sons of the ancestral property.

What the Court has to consider under Sub-section (3) is not the capacity of the unmarried daughter to earn but the existence of the source of her income and the mere fact that she is a college-going girl and can get herself employed and earn is not a ground for refusing her claim to be maintained by the parent. *Lakshmi v. Krishna Baita*,¹¹⁵

The obligation of a Hindu father includes the obligation to maintain his unmarried daughter not only for the purpose of her day to day expenses, but also in respect of the reasonable expenses of her marriage. This applies whether there is joint family property or not.¹¹⁶ Looking upon maintenance as a matter provided in the Act 78 of 1956 and hence any daughter claiming maintenance which takes in the marriage expenses of an unmarried

(109) 1961 Raj. 207

(110) (1970) 1 S.C.J. 176: 1970 S.C. 446.

(111) 1969 Punj. 283.

(112) *Lakshmi v. Krishna Baita*, 1968 Mys. 288.

(113) *Ibid.*

(114) A.I.R. 1968 Mys. 288.

(115) *Chandra Kishore v. Nanak Chand*, 1975 Delhi 175. See also *Dachand C. Shah v. County of Expenditure*, (1970) 78 I.T.R. 534 [Both the undivided family on the one hand and the parent of the bride on the other are under a legal obligation to meet the legitimate expenses of the marriage of the daughter].

daughter under Section 3 (b) (ii) of the Act would have to work out her rights under the Act, it has been held that recourse is not permissible to the Hindu joint family law for reservation at partition of a provision for marriage expenses.¹¹⁵

2. Scope of the Section.—This section operates prospectively. Thus it will not be open to an illegitimate child to found a claim under Section 20 for past maintenance.¹¹⁷ In the case of a decree for maintenance obtained long before this Act by a minor illegitimate son represented by a Court guardian appointed under the Guardians and Wards Act, since the minor will continue as a minor until he attains 21 years, an execution petition by the minor to enforce the maintenance decree relating to a period after he had attained 18 but before he completed 21, will be maintainable because this Act is intended to have operation in addition to and not in derogation of the Guardians and Wards Act.¹¹⁸ There is nothing in Section 20 (2) to suggest that the son legitimate or illegitimate, can claim maintenance only against a Hindu father or mother. An illegitimate son of a Muslim by a Hindu concubine can claim maintenance under Section 20 (2) against the Muslim putative father.¹¹⁹

3. Miscellaneous.—Maintenance for the son is not to be included in fixing mother's permanent alimony under Section 23, Hindu Marriage Act. The mother may seek the same by separate proceedings.¹²⁰ Merely because of loss of family life by reason of the adoptive parents leaving him due to his misbehaviour the adopted son will not be entitled to any right of maintenance.¹²¹ The only forum available to persons claiming maintenance under this Act is to have recourse to the Civil Court.¹²²

21. Dependants defined—For the purposes of this Chapter "dependants" mean the following relatives of the deceased:—

- (i) his or her father;
- (ii) his or her mother;
- (iii) his widow, so long as she does not re-marry,
- (iv) his or her son or the son of his predeceased son or the son of a predeceased son of his predeceased son, so long as he is a minor: provided and to the extent that he is unable to obtain maintenance, in the case of a grandson from his father's or mother's estate, and in the case of a great-grandson, from the estate of his father or mother or father's father or father's mother;

(115) *Karuppana Gounder v. Chinnu Nachammel*, (1974) 1 M.L.J. 27 84 L.W. 27. [For a critical examination of this decision, see Derrett on An Intestate's daughter's Marriage Expenses in (1974) 2 M.L.J. p. 26 [Journal section]. Cf. *Nalla Lakshamma v. Venkataswami*, (1970) 1 An. W.R. 245.

(117) *Vasappa v. Senthamma*, (1967) 2 An. W.R. 475; 1969 A.F. 15; *Jalwant v. Arind*, 70 Bom.L.R. 67; 1968 Bom. 804.

(118) *Senthayam v. Ramaswami Reddy*, (1966) 2 M.L.J. 546; 79 L.W. 260.

(119) *K.M. Adnan v. Gopalakrishnan*, (1974) 2 M.L.J. 110; 1974 Mad. 292.

(120) *Patel Dharmaji v. Bai Sobar Karji*, 1968 Guj. 179.

(121) *Nanda Krishna v. Bhagavada Acharya*, 1965 Cal. 181.

(122) *Krishnan Lal v. Sunderbhan Kaur*, (1970) 80 Punj. L.R. 147.

- (e) his or her unmarried daughter, the unmarried daughter of his predeceased son or the unmarried daughter of a predeceased son of his predeceased son, so long as she remains unmarried: provided and to the extent that she is unable to obtain maintenance, in the case of a grand-daughter from her father's or mother's estate and in the case of a great-grand-daughter from the estate of her father or mother or father's father or father's mother;
- (f) his widowed daughter; provided and to the extent that she is unable to obtain maintenance—
 - (a) from the estate of her husband; or
 - (b) from her son or daughter, if any or his or her estate; or
 - (c) from her father-in-law or his father or the estate of either of them;
- (iii) any widow of his son or of a son of his predeceased son, so long as she does not re-marry: provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter, if any, or his or her estate; or in the case of grand-son's widow, also from her father-in-law's estate:
- (iii) his or her minor illegitimate son, so long as he remains a minor;
- (iv) his or her illegitimate daughter, so long as she remains unmarried.

Section 21—Synopses

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|---|---|
| 1. Dependants defined | daughter or son's son's daughter. |
| 2. Maintenance of father. | 7. Maintenance of widowed daughter. |
| 3. Maintenance of mother. | 8. Maintenance of son's widow and son's son's widow. |
| 4. Maintenance of widow. | 9. Maintenance of illegitimate children. |
| 5. Maintenance of son, and son's son and son's son's son. | 10. Maintenance of relations not coming within the class of dependants. |
| 6. Maintenance of unmarried daughter, son's | |

1. **Dependants defined.**—This section defines dependants as meaning the following relatives of the deceased. These are (1) his or her father, (2) his or her mother, (3) his widow, (4) his son or son of his predeceased son or the son of predeceased son of his predeceased son so long as he is a minor, (5) his or her unmarried daughter or the unmarried daughter of his predeceased son or the unmarried daughter of a predeceased son of his predeceased son so long as she remains unmarried, (6) his widowed daughter, (7) any widow of his son or of a son of predeceased son so long as she does not re-marry, (8) his or her minor illegitimate son, (9) his or her illegitimate daughter so long as she remains unmarried.

This section read with the next section creates new liabilities and rights relating to maintenance and does not affect the old Hindu Law regarding right to maintenance in respect of coparcenary property (*Gowarda v. Gangabai*).¹²³ For instance, a permanently-kept concubine whose paramour had died before the Act has her right to claim maintenance both for herself and for children born to him out of his estate and this right is not taken away by the Act (*Gopala Rao v. Setteeramma*).¹²⁴

(123) A.S.R. 1964 M.P. 108.

(124) A.I.R. 1965 S.C. 1770; (1965) 2 S.C.J. 129.

It must be observed that this section has reference to the maintenance of relations from the estate of the deceased person as is clear from the definition of the dependant as meaning *a relative of the deceased*. It must also be noticed that many of the dependants enumerated here are also the heirs of the deceased with the result that the same person may have a dual right, one as an heir and the other as a dependant; for instance the mother and the widow come also under the first class of heirs in the schedule to the Hindu Succession Act and are therefore entitled to succeed to the property of a Hindu male on his death; these are also mentioned in this section as the dependants of the deceased and as such entitled to be maintained out of the estate of the deceased. A question may arise how the same person can be both an heir and a claimant to maintenance in respect of the estate of a deceased person. The answer to this question is to be gathered from the provisions of the next section dealing with maintenance of dependants. A Hindu may make a gift or die leaving a will giving all his properties to some stranger or a distant relation, cutting off his widow or his mother, from any share in his properties. In such a case the mother and the widow are entitled to get maintenance as dependants from the person who takes the estate under the will. So also a man may die leaving a will in respect of a portion of his estate, leaving the rest of his properties to be inherited by his heirs such as his widow and mother. In such a case, if the widow or the mother taking as heir the property left undisposed of by the deceased under his will finds the share taken by her insufficient to meet her maintenance from its income, she will be entitled to ask for contribution for a proper maintenance from the person taking the estate under the will.

2. **Maintenance of father.**—Father is a dependant of both the son and daughter, and if the son or daughter dies leaving an estate the father can claim maintenance out of that estate. It should be noticed under the old law the daughter was never held to be under a liability to maintain the father. In this respect this section introduces an innovation based upon grounds of natural disposition. Though the provision does not condition the liability to the nonpossession of independent means by the father, that undoubtedly is a condition precedent to the maintainability of the claim as is clear from the provisions of Section 23. It should be remembered also that the father is not a primary heir coming under Class I of the Schedule to the Hindu Succession Act.

3. **Maintenance of mother.**—Maintenance of mother is a liability of the estate left by the son or daughter. The liability of a daughter to maintain the mother is also an innovation on moral grounds. The mother being an heir to the son coming in the first class of heirs in the schedule to the Hindu Succession Act, she cannot be a dependant entitled to claim maintenance from the estate of her son if he has died intestate. But if he has left a will bequeathing his entire property to another, she can claim maintenance from his estate from the person who has taken the estate as is provided for in the next section. Neither the fact that she has re-married nor the fact that she is unchaste would make her forfeit her claim. But if she has independent means of her own, then under Section 23, that would be taken into consideration by the Court on the question whether and if so what extent the estate of the son should be made liable for her maintenance.

4. **Maintenance of widow.**—The widow is both an heir to and a dependant on the estate of the husband. If she takes as heir, the question of her right to be maintained out of his estate does not arise. If, on the other hand, she is cut out or given only a meagre provision under the will of the husband, she is entitled to claim maintenance

in the fixation of which the Court will be guided by the consideration mentioned in Section 23. If the widow re-marries, she will forfeit her right to be maintained as a dependant of her former husband out of his estate.

5. Maintenance of son and son's son and son's son's son.—The liability of the estate of a deceased Hindu for the maintenance of his lineal male descendants extends only to his great-grandson and does not go further. It must be remembered that these are also the primary heirs coming under Class I of the Schedule to the Hindu Succession Act, and hence cannot claim maintenance out of the estate of the progenitor if the latter had died intestate, and they take as heirs his property. In the case of a son's son and in the case of a son's son's son, they will not be entitled to claim maintenance out of the estate of their ancestor if they can get adequate maintenance from the estate of their nearer parent or grandparent. But if the rate of maintenance obtainable from the estate of the grandfather or grandmother or the estate of the father or mother of such descendant is inadequate, then for the deficiency a claim can be made against the estate of the remoter ascendant not higher than the great-grandparent male or female.

6. Maintenance of unmarried daughter, son's daughter or son's son's daughter.—The right to maintenance out of the estate of the deceased in respect of these girls is conditioned by her state of being unmarried. The fact that she had married but had become a widow would not help her claim. But the circumstance that she is leading a life of immorality and shame would not disable her from claiming maintenance, though this may be a circumstance which the Court may consider under Section 23 in the determination of both her right to and quantum of maintenance. Here also as in the case of son, grandson and great-grandson the right is claimable only if the claimant is not able to get maintenance from a nearer ancestor or ancestress. It may be observed here that the right is claimable even though the claimant is a major so long as she is unmarried and while the continuance of minority in the claimant is a condition essential to support the claim in the case of a son, son's son or son's son's son, that is not an essential pre-requisite in the case of a daughter, son's daughter or son's son's daughter.¹²⁵

The liability of a grandfather to support his son's daughter exists independently of the existence of any ancestral property in the hands of her grandfather *Jai Kaur v. Pala Singh*.¹²⁶

7. Maintenance of widowed daughter.—The liability to maintain a widowed daughter of the deceased is provided for from out of the deceased's estate, the same not being comprehended in the previous provision of an unmarried daughter. But in the case of a widowed daughter she can claim maintenance provided and to the extent that she is unable to obtain maintenance from the estate of her husband, from her son or daughter or his or her estate or from her father-in-law or his father or the estate of either of them. It will be noticed that there is an obvious anomaly between the provision in section 21 (b) and section 19 (1). While the provision in 21 (a) provides that the liability of the father to maintain his widowed daughter cannot be enforced as against the estate of the father so long as she is able to obtain maintenance from her father-in-law. Section 19 (1) says that she cannot get maintenance from her father-in-law so long as she can get maintenance from her father.

(125) See *Wali Ram v. Smt. Mukharaj Kaur*, 1962 Punj. 285.

(126) 1961 Punj. 391.

But this anomaly need not be considered very seriously in view of the provisions of section 23 under which the Court is given the widest discretion to mould justice according to the circumstances of each case when the rights and duties are in conflict.

8. **Maintenance of son's widow and son's son's widow.**—The right of the son's widow and the widow of son's son to get maintenance out of the estate of the deceased is conditioned by her being without re-marriage, and by the circumstance that they are not able to get maintenance from the estate of her husband or son or daughter or his or her estate and in the case of grandson's widow also from her father-in-law's estate. There is no further condition that she should also continue to be chaste. If she is, however, unchaste, that may be considered by the Court under Section 23 in the determination of her right to and quantum of her maintenance.

9. **Maintenance of illegitimate children.**—Illegitimate children are also entitled to maintenance as dependants of the deceased Hindu with this condition that in the case of an illegitimate son he should be a minor and in the case of an illegitimate daughter she should be unmarried. Neither the fact that the illegitimate daughter has attained majority nor the fact that she is leading an immoral life would disentitle her to claim maintenance, though this aspect may well fall within the discretionary scope of the jurisdiction of the Court in the consideration of the question of the right to and quantum of maintenance. In *Jaswant Majatal v. Naranahandra*,¹²⁷ the question was whether an illegitimate daughter of a Hindu who had died prior to the Act was entitled to claim maintenance from the estate of the putative father as a dependant of the latter. In answering the question in the negative the Court pointed out that the Act not being retrospective and the illegitimate daughter not having any right to maintenance under the Hindu Law prior to the Act, she could not claim as a dependant under the Act under section 22 though if her father had died after the Act her right as a dependant might succeed.

10. **Maintenance of relations not coming within the class of dependants.**—A question may arise whether in the case of persons who were entitled to be maintained prior to the Act but whose rights are not specifically provided for under the Act either under this section or under any other section, their rights still survive under the old law or they do stand abrogated. The answer must be rendered with reference to the facts as follows:—If they are governed specifically by the provisions of the Act, then the old law ceases to apply and the answer should be rendered with due regard to the provision that governs. If there is no specific provision and if the right had arisen before the Act, then the old Hindu Law would apply. But if the case is one which is governed neither by the old law nor by the Act and even the extended doctrine of conversion of moral duty into legal duty envisaged by the decisions under the old law would not cover the case, then it should be left out of account altogether and the person cannot claim any maintenance. In this view the claim of a married sister to be maintained by her brother who had taken the father's estate, though not provided for in the Act, would be one under the above extended doctrine of Hindu Law in the case of unprovided daughter and other close relations of the deceased owner of the estate against which the claim is made. *Ramabai v. Meerabai*.¹²⁸

(127) 1958 Bom. 304.

(128) 1965 M.P.L.J. 300.

22. Maintenance of dependants.—(1) Subject to the provisions of sub-section (2) the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased.

(2) Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.

(3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), no person who is himself or herself a dependant shall be liable to contribute to the maintenance of others, if he or she has obtained a share or part the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act.

Section 22—Synopsis.

1. Scope of the section.

2. Maintenance of dependants.

1. Scope of the section.—This section is not retrospective.¹²⁹ Sections 4 and 22 do not abridge the pre-existing rights of maintenance of a sister from her brother who had received the father's estate.¹³⁰ Sub-section (1) embodies the principle of pre-existing law that the moral obligation of the deceased to maintain certain relations becomes a legal obligation in the hands of the heirs who succeed to his estate.¹³¹

2. Maintenance of dependants.—The liability of the heirs of the deceased to maintain the dependants is subject to the following conditions. If the dependant has not obtained any share in the estate of the deceased either by testamentary or intestate succession after the commencement of this Act, the dependant shall be entitled to maintenance from those who take the estate. The liability of each of the persons who take the estate is not a joint liability with the rest of them but an individual liability in proportion to the value of the share or part of the estate taken by him or her. If the dependant himself or herself has taken a share in the estate then he or she will not be liable to contribute to the maintenance of another dependant if the value of the share taken by him or her would be less than what would be awardable to him or her if his or her right to maintenance is to be enforced. This may be illustrated as follows: Let us suppose that the widow of the deceased is given property by the deceased husband under his will and this property would yield her an annual income of Rs. 1,000 which would be just reasonable for her maintenance and would be awarded to her by Court in case she has not been given any property by the husband. On these facts she cannot be called upon to contribute to the maintenance of another dependant of her husband. If in such a case the reasonable main

(129) *Varada v. Sathanna*, 1969 A.P. 15.

(130) *Ramabai v. Madhavai*, 1965 M.F.L.J. 500.

(131) *Puri Bai v. Banajidhar*, 1971 Cal. 270.

tenance of the widow would not exceed Rs. 500 a year, than in respect of the surplus in her hands she may be called upon to contribute to the maintenance of another dependant of her husband's estate.

In *Gulzara Singh v. Smt. Tej Kaur*.¹³² it was held that the expression 'heir' used in Section 22 includes all those on whom the estate of the deceased devolves whether on intestacy or by means of a testamentary instrument like a will. The principle is that whoever gets the estate of the deceased or a part of it must in proportion get along with it a corresponding obligation or burden of maintaining the dependants of the deceased.

A combined reading of the provisions of sub-sections (1) and (2) of Section 22 imposes a liability on a heir and confers a correlative right on the dependants to claim maintenance under the provisions of the Act. Sub-section (2) excludes the dependants acquiring a share in the property of a person who dies after the Act from claiming maintenance. In view of the general terms of Section 21, it must be held that under the Act, every dependant subject to limitations laid in Section 22 has a right to claim maintenance against the heir of a Hindu whether he died before or after the Act. *Kameswaraswami v. Subrahmanyam*.¹³³

There is no duty on a widow-dependant to reside with the relatives of the husband and in awarding maintenance to her there is a discretion in the Court to award her a lower rate of maintenance in respect of arrears than the rate awarded for future maintenance (*Gowardas v. Gangabai*).¹³⁴

An unmarried daughter who has taken a share in the deceased father's property as an heir under the Hindu Succession Act cannot claim any further right as against the other heirs for her maintenance or marriage expenses.¹³⁵

The liability of a grand-father to support his son's daughter exists independently of the existence of any ancestral property in his hands.¹³⁶

23. Amount of maintenance.—(1) It shall be in the discretion of the Court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so the Court shall have due regard to the considerations set out in sub-section (2) or sub-section (3), as the case may be, so far as they are applicable.

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to—

- (a) the position and status of the parties;
- (b) the reasonable wants of the claimant;
- (c) if the claimant is living separately, whether the claimant is justified in doing so;

(132) A.I.R. 1961 Punj. 205.

(133) A.I.R. 1959 A.P. 269.

(134) A.I.R. 1966 M.P. 163.

(135) *Kapoor Kaur v. Kishan Singh*, 1970 Punj. 270; *Nalla Lakshmi v. Pundarikoti*, (1970), 1 An. W.R. 245.

(136) *Jai Kaur v. Pals Singh*, I.L.R. (1961) 2 Punj. 151; 1961 Punj. 301.

- (d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;
- (e) the number of persons entitled to maintenance under this Act.
- (5) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to—
 - (a) the net value of the estate of the deceased after providing for the payment of his debts;
 - (b) the provision, if any, made under a will of the deceased in respect of the dependant;
 - (c) the degree of relationship between the two;
 - (d) the reasonable wants of the dependant;
 - (e) the past relations between the dependant and the deceased;
 - (f) the value of the property of the dependant and any income derived from such property, or from his or her earnings or from any other source;
 - (g) the number of dependants entitled to maintenance under this Act.

Section 23—Synopsis.

- | | |
|---|----------------------|
| 1. Amount of maintenance | 3. Award of arrears. |
| 2. Separate maintenance to daughter under | 4. Costs. |
- Section 23 (2) (c).

1. **Amount of Maintenance**—In fixing maintenance, this section should be taken along with Section 3 (b) according to which maintenance includes (i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment; (ii) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage. The fixing of amount is not left to caprice but to the exercise of sound discretion by the Court which shall have due regard to the considerations mentioned in this section.¹⁸⁷ Courts should consider the status of the family, the earnings and the commitments of the husband and what is required by the wife to maintain herself. As to the latter the Courts should steer clear of two extremes, namely, they should not give maintenance, to the wife which would keep her, in luxury and would make judicial separation profitable impeding any future chance of reconciliation; the Courts should also steer clear of the other extreme, namely penuriousness.¹⁸⁸ On this question the Supreme Court has expressed agreement,¹⁸⁹ with the view of the Privy Council in *Bredeshwar v. Homeshwar*,¹⁹⁰ that maintenance depended "upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the conditions and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and mode of living, and to the age, habits, wants, and class of life of the parties." The Court can take note of post-suit

(187) *Kishan Bala v. Bankim Chandra*, 1967 Cal. 603.

(188) *Karimati Saje v. Srimati Dird*, 1971 (1) C.W.R. 545 1971 Orissa 293.

(189) *Kulbhushan v. Raj Kumari*, (1971) 2 S.C.J. 270; 1971 S.C. 234.

(190) 1929 P.C. 128.

events also and shape its decree so as to shorten litigation, preserve the rights of the parties and subserve the ends of justice.¹⁴¹ In determining whether any and what amount of maintenance is awardable to the particular claimant the Court has to keep the following considerations in mind. In determining the amount of maintenance awardable to a wife, children or infirm parents, regard should be had to the position and status of the parties, the reasonable wants of the claimant, whether the claimant is justified in living separately when he or she wants separate maintenance, the income and value of the claimant's property from which the maintenance can be met and the number of claimants entitled to maintenance under the Act. In determining the amount of maintenance awardable to a dependant under this Act, regard shall be had to the net value of the estate of the deceased after providing for the payment of his debts, the provision made under the will of the deceased in respect of the dependant, the degree of relationship between the claimant and the deceased, the reasonable wants of the dependant, the past relations between the dependant and the deceased, the means of the dependant from which the maintenance can be met in whole or in part, and the number of dependants entitled to maintenance under this Act. It would be observed that these are mere guiding principles to regulate the exercise of the judicial discretion and not absolute mandatory rules. Even outside these considerations there is a large domain of principles and precepts which the Court has to bear in mind, the sole aim and object of the Court being what would be a just and reasonable allowance in all the circumstances of the case.

Section 23 (2) makes no departure from the principles enunciated except perhaps to a limited extent envisaged in sub-clauses (d) and (e) of the sub-section.¹⁴²

The words, "the position and status of the parties" in sub-section (2) are wide to include the financial position of both the parties. In a case where the Court is satisfied that the wife who claims maintenance from her husband had left him without any adequate and reasonable cause, it is permissible and proper for the Court to direct that the quantum of maintenance awardable to the wife should be fixed at a less liberal rate than otherwise could be permissible if the wife had left the husband for quite a proper and justifiable ground. *Motylak Satyanarayanaiah v. Jagamma*.¹⁴³

2. *Separate maintenance to daughter under Section 23 (2) (e).*—A daughter who is living away from her father on account of his having taken a second wife with whom he has been living (the daughter living with her mother who is the first wife of the father living separately) is entitled to claim separate maintenance from the father *Laxmi v. Krishna Bhatta*.¹⁴⁴

3. *Award of arrears.*—The award of arrears of maintenance at the same rate as future maintenance would cause such hardship to the person who is liable to pay main-

(141) *Kim Bala v. Bhabhi Chandra*, 1907 Cal. 609. *Srinivasulu v. Subbiah Pillai*, (1963) 1 M.L.J. 108: 1963 Mad 208.

(142) *Kulbhushin v. Raj Kumar*, (1971) 2 S.C.J. 270: 1971 S.C. 294.

(143) 1963 A.P. 490.

(144) 1966 Mys. 259.

tenance. Ordinarily it is in the discretion of the Court to award arrears at a lesser rate. This may even be half the rate at which future maintenance is awarded.¹⁴⁵

4. *Costs*.—Since the plaintiff cannot ordinarily claim any exact amount as rate of maintenance and the plaintiff pitches it at a high rate and the defendant at a low one, the proper order as to costs is to direct each party to bear his own costs.¹⁴⁶

24. *Claimant to maintenance should be a Hindu*.—No person shall be entitled to claim maintenance under this Chapter if he or she has ceased to be a Hindu by conversion to another religion.

NOTES

Claimant to maintenance must be a Hindu.—The restriction that the claimant to maintenance in order to be in a position to maintain his claim must be a Hindu is understandable and is conceived in the interest of the Hindu community at large. The complications that would arise if this restriction is not in the statute can easily be imagined.

In *Sunderambal v. Subbiah Pillai*,¹⁴⁷ it was held that a Hindu unmarried daughter who had ceased to be a Hindu by reason of her conversion to Christianity could not maintain a suit for past maintenance even for a period prior to conversion. It is well-settled that the right to claim maintenance is no more than a mere personal right which stemmed from the relationship of the parties and the provisions of Hindu Law relating thereto, and being a personal right it cannot survive either the death or conversion of the person claiming maintenance. Where maintenance had not been ascertained either by agreement of parties or by decree of Court having regard to the nature of the right to maintenance and the provisions of Section 24 it would not be open to her to claim arrears of maintenance after her conversion even for the period during which she remained a Hindu.¹⁴⁸

25. *Amount of maintenance may be altered on change of circumstances*.—The amount of maintenance, whether fixed by a decree of Court or by agreement either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration.

Section 25—Synopsis.

1. Scope of section.

2 Alteration of the amount of maintenance.

1. *Scope of the section*.—Under Section 25 a decree or agreement fixing maintenance would not bar a wife from claiming increased maintenance if the circumstances justify such alteration. It is immaterial whether the decree or agreement was before or after the Act, notwithstanding the fact that the claimant had agreed not to claim higher maintenance even in changed circumstances. The right conferred under the section supersedes any contract

(145) 1966 Mys. 288. See also *Guardian v. Gangabal*, 1964 M.L.J. 163; 1964 M.P. 168.

(146) *Attanas v. Chappal Chetty*, (1966) 2 An. W.R. 198; 1967 A.P. 60.

(147) 1961 Mad. 323; (1961) 1 M.L.J. 237.

(148) *Sunderambal v. Subbiah Pillai*, (1965) 1 M.L.J. 106; 1965 Mad. 260, an appeal from (1961) 1 M.L.J. 237; 1961 Mad. 323.

to the contrary. This section conferred ample powers on the Court to alter either by varying or modifying any order fixing the amount of maintenance made by a decree of the Court or by agreement subsequently if there was a material change in the circumstances justifying such alteration.¹⁴⁹

The section supercedes the agreements, if any, whereunder the maintenance-holders had contracted not to claim enhancement of the maintenance fixed in the agreement or decree. Thus the section is retrospective in so far as it disregards any such term of the agreement or decree.¹⁵⁰ The section relates only to such decrees or agreements in favour of persons who either under the traditional Hindu law or under the Act are entitled to maintenance. Any other agreement will be outside its scope.¹⁵¹ Variation under the section can be granted from period anterior to the suit.¹⁵² Section 25 cannot apply where the right to maintenance has been relinquished by the agreement.¹⁵³

2. *Alteration of the amount of maintenance.*—This section is virtually the enunciation of the old law for which (see Section 222 of the body of the book.) To justify alteration of the amount fixed, there must be a substantial or material alteration in the circumstances of the parties. These circumstances may concern the claimant or the person or the estate bound to maintain, or they may even have relation to the general conditions of the community. For instance, owing to the enormous rise in the prices of necessities of life the old rate may require enhancement, or the persons or the estate against whom or which the claim is available may face a financial crisis or collapse, and it would be equitable that the rate which was originally princely, may require reversion to a lesser scale. Judicial notice may even be taken of abnormal increase in the cost of living and an applicant is not disentitled to increased maintenance for not leading evidence thereon.¹⁵⁴ Where the circumstances of any particular case demand a review and revision of the rate formerly fixed having regard to different circumstances, even the fact that the rate has been fixed by a decree of Court cannot be a bar to this exercise of equitable jurisdiction. Formerly there had been some doubt whether a lump sum fixed in full quit of the maintenance claim can be gone back upon and enhanced on the ground of change of circumstances, but this section it is submitted, resolves that doubt in favour of the view that even if a lump sum is fixed for all time, that amount can be revised when a clear case is made out for such revision: *Seshiammal v. Thepis Ammal*.¹⁵⁵ A distinction ought to be made between a lump sum amount fixed as maintenance for life and a lump sum paid as consideration for relinquishment of the right to maintenance itself. In the former the right subsists and in the latter the right is extinguished.¹⁵⁶ The obligation to maintain the wife is

(149) *Ammalammal v. Raju*, (1978) 2 M.L.J. 71; 90 L.W. 606; 1978 Mad. 103.

(150) *Kandamm v. Sathiammai*, (1975) An. W.R. 37; 1975 A.P. 219.

(151) *Ferguson v. Sathiammai*, (1967) 2 An. W.R. 475; 1969 A.P. 15.

(152) *Pudumothu Sugi Devi v. Rajikumar Devi*, 1965 Oriss 122.

(153) *Madhavan v. Chinnappa*, (1968) 1 An. W.R. 625.

(154) *Indira Bai Patel v. B. A. Patel*, 1974 A.P. 393.

(155) (1963) 2 M.L.J. 405; 75 L.W. 271; 1964 Mad. 217.

(156) *Kandamm v. Sathiammai*, *supra*.

personal in character and arises from the very foundation of the existence of the relationship between the parties. If the right is given up or relinquished completely in consideration of a lump sum or consolidated payment, the maintenance-holder cannot agitate her claim over again unless the contract of relinquishment is attacked or vitiated by undue influence or fraud. But if the right to maintenance is given up on receipt of a consolidated amount under an agreement with a stipulation not to ask for more but without relinquishing her subsisting right the position will be different.¹⁵⁷ The word agreement in section 25 is comprehensive enough to take in an agreement as to rate as well as an agreement not to claim enhanced rate and hence notwithstanding an agreement by a widow not to claim higher rate of maintenance in future whatever be the change in the circumstances, she is entitled to claim enhanced maintenance owing to change of circumstances. *Kamswara Amma v. Subahmnyam*¹⁵⁸ A family settlement is an agreement between the parties and a suit for enhanced maintenance is maintainable.¹⁵⁹ In *Ambaya Ammal v. Ganapati*¹⁶⁰ it was held that even in the case of a compromise decree awarding maintenance where the widow had agreed not to claim enhanced maintenance the section can be applied in case of change of circumstances irrespective of the question whether the claim had arisen either before or after the Act; In *Veeranna v. Seethamma*¹⁶¹ it was held that where on a surrender by a widow of her estate an agreement was entered into between the widow and the reversioner by and under which the widow was to be paid a particular rate of maintenance during her life which was not to be altered subsequently, this rate was not liable to be enhanced under this section as the same would be inapplicable to the case. But see the Madras view in *Chinnakuruppa Gounder v. Narayammal*.¹⁶² Where the rate of maintenance is fixed by agreement or decree and there is no provision in the decree for varying the amount fixed upon application to the Court, the only way by which the rate fixed can be amended or altered is by agreement of parties in the case of agreement or by suit in case either of agreement or decree. (*Bind Prasad Singh v. Smt. Mandrika Devi*¹⁶³; *Manoka Bala v. Ponchanan*¹⁶⁴ *Rangamma v. Venkatarajulu Chetty*¹⁶⁵ A claim for increased maintenance than that awarded by the lower Court on account of increased cost of living cannot be allowed in the course of appeal. The proper remedy is by separate proceedings.¹⁶⁶

26. Debts to have priority.—Subject to the provisions contained in Section 27 debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under this Act.

(157) *Munimmal v. Raja*, (1978) 2 M.L.J. 71; 90 L.W. 666; 1978 Mad. 103.

(158) 1959 A.P. 269; (1959) 1 An. W.R. 12

(159) *Rangamma v. Venkatarajulu Chetty*, 1966 Mad. 428.

(160) (1963) A.P. 213; (1963) 1 An. W.R. 41.

(161) (1967) 2 An. W.R. 475.

(162) 1964 Mad. 169.

(163) 1968 Pat. 195.

(164) 1968 Cal. 228; 69 Cal. W.N. 228.

(165) 1966 Mad. 428.

(166) *Laxmi v. Krishna Shetty*, 1969 Mys. 268.

NOTES

Debt to have Priority.—A claim to maintenance is not a charge on property unless it is made so, as is provided for under the next section. In the absence of such a charge, debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under this Act. The use of the words "payable or contracted by the deceased" makes it clear that even though a liability is not contracted by the deceased if it is one enforceable against his estate, it is entitled to priority.

27. Maintenance when to be a charge.—A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased owner or by a decree of Court, or by agreement, between the dependant and the owner of the estate or portion, or otherwise.

NOTES

Maintenance when to be a charge.—This section merely lays down that no maintenance claim can be considered a charge on property unless a charge is created on the property either by the will of the deceased owner, or by a decree of Court or by agreement between parties. See Section 226 in the body of the book. Where no relief is prayed for to create a charge and the property to be charged has not even been mentioned in the plaint it would not be right to travel beyond the plaint.¹⁶⁷ Where the creation of a charge in respect of the maintenance claim by a wife and unmarried daughter is permissible prior to this Act, such a charge will be preserved by Section 4 and Section 27 will not be acted since neither of them is a "dependant" within the meaning of Section 21. They cannot enforce their maintenance claim against the property even though it is nominally alienated.¹⁶⁸ While Section 27 is clear that a claim for maintenance could be made a charge on the estate of the deceased by a decree of Court there is no provision in the Act under which a decree for possession of the property can be granted.¹⁶⁹

28. Effect of transfer of property on right to maintenance.—Where a dependant has a right to receive maintenance out of an estate and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of the right.

NOTES

Effect of transfer of property on right to maintenance.—The right to receive maintenance from and out of an estate can be enforced though not charged on the property, against the transferee of the property who is a gratuitous transferee or one with notice of the right. But if the transfer is for consideration and without notice of the right, the right cannot be enforced against such transferee. This section is a virtual reproduction of the principle of Section 39 of the Transfer of Property Act. See also Section 227 of the body of the book. It is not correct to contend that Section 28 has overridden Section 39 of the Transfer of Property Act in the application of the latter section to a Hindu wife, and the wife is still entitled to rely on

(167) *Kishin Bala v. Sankar Chandra*, 1967 Cal. 608.

(168) *Shankar v. Shyam Lal*, 1966 Mys. 308.

(169) *Sas. Shree v. Sas. Shree*, 1972 F. & H. 130.

Section 39 of the Transfer of Property Act which is left entirely unaffected by the Hindu Adoptions and Maintenance Act of 1956, (*Rameswamy Gounder v. Baghyathammal*¹⁷⁰ *Ramappa v. Gurusu*¹⁷¹ *Laxmi v. Krishna Shasta*¹⁷²). The moral obligation of a father-in-law to maintain his widowed daughter-in-law ripened into a legal obligation in the hands of his heirs. This legal obligation is embodied in Section 22 (1) and if the conditions stated in Section 28 are satisfied an alienee from such heir would be bound by the transferor's obligation to maintain. Section 28 does not however apply where the father-in-law had transferred his separate property himself, for the reason that not being bound by any legal obligation he was free to alienate the property and confer absolute title to the transferee free from any obligation to maintain. Under the pre-statute law the widowed daughter-in-law had no rights even against a transferee from her husband himself. Her position could not be better against an alienee from her father-in-law and there is nothing in the Act to suggest that her position has improved under the Act.¹⁷³

CHAPTER IV

REPEALS AND SAVINGS

29. Repeals.—[Repealed by Act LVIII of 1960].

30. Savings.—Nothing contained in this Act shall affect any adoption made before the commencement of this Act, and the validity and effect of any such adoption shall be determined as if this Act had not been passed.

NOTES

Savings.—This section saves the adoptions made prior to the Act from the operation of this Act and provides that nothing contained in this Act shall affect any adoption made before the commencement of this Act, and the validity and effect of any such adoption shall be determined as if this Act had not been passed. Before this Act, in some communities, there were customary adoptions such as an adoption to each of the wives of the same person, or an adoption to a deceased person by his relations as in the case of the Nattukottai Chetti community, and also *Krishna* adoptions, *dyamshyagana* adoptions and *illatom* adoptions which were recognised by the Courts. All these adoptions which could be valid if performed before the Act can no longer be valid if done after the commencement of this Act. This would be the effect of sections 4 and 5 of this Act also.

(170) 1967 Mad. 457; (1966) 2 M.L.J. 579.

(171) 1968 Mys. 270.

(172) *Laxmi v. Krishna Shasta*, 1978 Mys. 208; Cf. *Bala Sanyal Krishna Kumar v. Varadachari*, (1976) 1 A.P. L.J. 238; 1976 A.P. 365.

(173) *Parsi Bala v. Rangachari*, 1971 Cal. 270.

APPENDIX

I

THE HINDU MARRIAGE ACT, BOMBAY HIGH COURT RULES.

Rules framed by the Bombay High Court under Sections 14 and 21 of the Hindu Marriage Act, 1955

(ACT XXV OF 1955)

1. **Short title and commencement.**—(i) These Rules may be called THE HINDU MARRIAGE AND DIVORCE RULES, 1955

(ii) These Rules shall come into force on 1st December, 1955.,

2. **Definitions.**—(i) "Act" means the Hindu Marriage Act, 1955 (Act XXV of 1955)

(ii) "Code" means the Code of Civil Procedure, 1908

(iii) "Court" means the Court mentioned in Section 3 (b) of the Act

3. **Petition.**—(a) Every petition under the Act shall be accompanied by certified extract from the Hindu Marriage Register maintained under Section 8 of the Act or from the Register maintained under the Bombay Registration and Marriage Act (Bombay Act V of 1954), where the marriage has been registered under the Bombay Act or this Act

(b) Every petition for divorce on any of the grounds mentioned in clause (nu) or (ix) of sub-section (1) of Section 13 of the Act shall be accompanied by a certified copy of the decree for judicial separation or for restitution of conjugal rights as the case may be.

4. **Contents of Petitions.**—In addition to the particulars required to be given under Order 7, rule 1 of the Civil Procedure Code and Section 20 (1) of the Act, every petition for judicial separation, nullity of marriage and divorce shall contain the following particulars :

(a) the place and date of marriage ;

(b) the name, status and domicile of the wife and husband, before and after the marriage ;

(c) the principal permanent address where the parties cohabited including the address where they last resided together ;

(d) whether there is living any issue of the marriage and, if so, the names and dates of birth, or ages of such issues.

(i) in every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons or for judicial separation on the ground that his wife has committed adultery with any person or persons, the petitioner shall state the name, occupation and place of residence of such person or persons so far as they can be ascertained ;

(ii) in every petition presented by a wife for divorce on the ground that her husband is living in adultery with any woman, the petitioner shall state the name, occupation and place of residence of such woman so far as they can be ascertained and if her husband has committed adultery with any woman or women the petitioner shall state the name, occupation and place of residence of such woman or women, so far as they can be ascertained ;

(e) whether there have been in any Court in India, and if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties and the result of such proceedings ;

- (f) the matrimonial offence or offences charged, set out in separate paragraphs with the time and place of its or their alleged commission ;
- (g) property mentioned in Section 27 of the Act, if any ;
- (h) the relief or reliefs prayed for.

5. Necessary parties.—(a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has committed adultery with any person, the petitioner shall make such person a co-respondent¹. The petitioner may, however, apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of such person as a co-respondent on any of the following grounds :

- (i) that the name of such person is unknown to the petitioner although he has made due efforts for discovery ;
 - (ii) that such person is dead ;
 - (iii) that the respondent being the wife is leading a life of a prostitute and that the petitioner knows of no person with whom adultery has been committed ;
 - (iv) for any other sufficient reason the Court may be deemed fit to consider.
- (b) In every petition under section 13 (2) (4) of the Act the petitioner shall make "the other wife" mentioned in that section a co-respondent.
- (c) In every petition under Section 11 of the Act on the ground that the condition in Section 5 (1) is contravened, the petitioner shall make the spouse alleged to be living at the time of the marriage a co-respondent

6. Verification of Petition.—Statements contained in every petition shall be verified by the petitioner or some other competent person in a manner required by the Code of Civil Procedure for the time being in force for the verification of plaints

7. Forms of petitions.—The petitions made under the Act shall, so far as possible, be made in the forms prescribed in the Schedule to the Indian Divorce Act, 1869 (IV of 1869).

8. Application for leave under Section 14 of the Act.—(1) Where any party to a marriage desires to present a petition for divorce within three years of such marriage, he or she shall obtain leave of the Court under Section 14 of the Act on *ex parte* application made to the Court in which the petition for divorce is intended to be filed.

(2) The application shall be accompanied by the petition intended to be filed bearing the proper court-fee under the law and in accordance with the rules. The application shall be supported by an affidavit made by the petitioner setting out the particulars of exceptional hardships to the petitioner or exceptional depravity on the part of the respondent on which leave is sought.

(3) The evidence in such application may, unless the Court otherwise directs, be given by affidavit.

(4) When the Court grants leave, the petition shall be deemed to have been duly filed on the date of the said order. The petitioner within a week of the date of the said order shall file sufficient number of copies of application for leave and order of the Court thereon and of the petition for divorce for service upon the respondent in the petition.

1. *Mogulal v. Bai Dishi*, A.I.R. 1971 Guj. 33—the word shall is mandatory. If the name of the person is unknown affidavit in that respect is necessary.

* It will now be one year.

9. Service of copy of application for and order granting leave on the respondents, and procedure after service.—(1) When the Court grants leave under the preceding rule a copy of the application for leave and order granting leave shall be served on each of the respondents along with the notice of the petition for divorce.

(2) (a) When the respondent desires to contest the petition for divorce on the ground that leave for filing the petition has been erroneously granted or improperly obtained, he or she shall set forth in his or her written statement the grounds with particulars on which the grant of leave is sought to be contested.

(b) The Court may, if it so deems fit, frame, try and decide the issue as to the propriety of the leave granted as a preliminary issue.

(c) The Court may, at the instance of either party, order the attendance for examination or cross-examination of any deponent in the application for leave under the preceding rule.

10. Notice.—The Court shall issue notice to the respondent and co-respondent if any. The notice shall be accompanied by a copy of the petition. The notice shall require, unless the Court otherwise directs, the respondent or co-respondent to file his or her statement in Court within a period of four weeks from the service of the notice and to serve a copy thereof upon each of the other parties to the petition within the aforesaid period.

11. Service of petitions.—Every petition and notice under the Act shall be served on the party, affected thereby in the manner provided for service of summons under Order 5 of the Civil Procedure Code.

Provided that the Court may dispense with such service altogether in case it seems necessary or expedient so to do.

12. Written statements in answer to petitions by respondents.—The respondent may and, if so required by the Court, shall present a written statement in answer to the petition. The provisions of Order 8 of the Code shall apply *mutatis mutandis*. In particular, if in any proceedings for divorce the respondent opposes the relief sought in the petition on the ground of the petitioner's adultery, cruelty or desertion, the written statement shall state the particulars of such adultery, cruelty or desertion.

13. Intervenor's petition.—(1) Unless the Court for good cause shown otherwise directs, where the written statement of the respondent alleges adultery by the petitioner with a named man or woman, a certified copy of such statement or such material portion thereof containing such allegation shall be served on such man or woman accompanied by a notice that such person is entitled within the time therein specified to apply for leave to intervene in the cause.

(2) Costs regarding intervention :

(a) Whenever the Court finds that an intervenor had no sufficient grounds for intervening it may order the intervenor to pay the whole or any part of the costs occasioned by the application to intervene.

(b) When the Court finds that the charge or allegation of adultery against the intervenor made in any petition or written statement is baseless or not proved and that the intervention is justified, it may order the person making such charge or allegation against the intervenor to pay to the intervenor the whole or any part of the costs of intervention.

14. Answer.—A person to whom leave to intervene has been granted may file in the Court an answer to the written statement containing the charges or allegations against such intervenor

15. Mode of taking evidence.—The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined like any other witness:

Provided that the parties shall be at liberty to verify the respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined, by or on behalf of the opposite party, orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed

16. Costs.—Whenever in any petition presented by a husband the alleged adulterer has been made a co-respondent and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the costs of the proceeding:

Provided that the co-respondent shall not be ordered to pay the petitioner's costs

- (i) if the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute; or
- (ii) if the co-respondent had not, at the time of adultery, reason to believe the respondent to be a married person

17. Applications for alimony and maintenance.—(a) Every application for maintenance *pendente lite*, permanent alimony and maintenance, or for custody, maintenance and education expenses of minor children, shall state the average monthly incomes of the petitioner and the respondent, the sources of these incomes, particulars of other moveable and immoveable property owned by them, the number of dependents on the petitioner and the respondent, and the names and ages of such dependents.

(b) Such application shall be supported by an affidavit of the applicant.

18. Taxation of Costs.—Unless otherwise directed by the Court, the costs of the petition under the Act shall be costs as taxed in a suit

19. Order as to costs.—The award of costs shall be within the discretion of the Court

20. Transmission of certified copy of the decree.—The Court shall send a certified copy of every decree for divorce or nullity or dissolution of marriage to the Registrar of Marriages in charge of the Hindu Marriage Register, if any, or in charge of the Register maintained under the Bombay Act V of 1934.

21. Applicability of the rules of the City Civil Court, Bombay.—Where any applications or petitions under the Act are filed in the City Civil Court, Bombay the Rules of that Court, except in so far as they are inconsistent with the Act and these rules shall apply to such applications or petitions.

II

THE HINDU MARRIAGE ACT, CALCUTTA HIGH COURT RULES, 1957.

1. These rules may be called the Hindu Marriage Act (Calcutta High Court) Rules, 1957.

2. In these rules, unless there is anything repugnant in the subject or context.

The "Court" means the Judge sitting in Court.

3. (i) Where a petition for dissolution of a marriage by a decree of divorce is presented before the expiry of three years* from the date of the marriage, the petitioner shall ask for the leave of the Court to present the petition by a separate application.

(ii) Every such application shall state in full the facts on which the petitioner wishes to rely for proof of the ground of exceptional hardship to the petitioner or exceptional depravity on the part of the respondent and shall also contain full particulars of the children of the marriage including age, sex and the place where, or the person or persons with whom, they are living. Such statement shall be fully verified by the applicant personally and when it is not so verified but verified by a different person, the reason therefor shall be stated :

Provided that if, before this rule comes into force, any petition for divorce has already been presented before the expiry of three years* from the date of the marriage, the Court will deal with such petition in such manner as it deems fit.

4. (i) The rule as regards the institution and trial of suits and as regards the execution of decrees and orders on the Original Side of the High Court shall apply, in so far as they are applicable, and shall be deemed to have always applied, to proceedings under the Hindu Marriage Act instituted on the Original Side of the High Court.

(ii) The City Civil Court Rules, 1956, shall apply, in so far as they are applicable, and shall be deemed to have always applied, to proceedings under the Hindu Marriage Act instituted in the City Civil Court.

III

RULES OF THE MADRAS HIGH COURT UNDER HINDU MARRIAGE ACT.

1. **Form of proceedings.**—The following proceedings under the Act shall be initiated by original petitions :

(i) Under section 9 for restitution of conjugal rights ;

(ii) Under section 10 (1) for judicial separation ;

(iii) Under section 10 (2) for rescinding a decree for judicial separation ;

(iv) Under section 11 for declaring a marriage *null and void* ;

(v) Under section 12 for annulment of a marriage by a decree of nullity ;

(vi) Under section 13 for divorce ;

(vii) Under section 26 to make orders and provisions with respect to the custody, maintenance and education of children.

2. Every other proceeding subsequent to the petition shall be by an interlocutory application.

* It will now be one year.

3. Every petition, application, affidavit, decree or order under the Act shall be headed by a cause-title in Form No.1 and shall set forth the provision of the Act under which it is made.

4. **Contents of petitions.**—(a) Every petition shall state

- (i) the place and the date of marriage, the names of the parties and their occupation, the place and address where the parties resided together within the jurisdiction of the Court ;
- (ii) the names of the children, if any, of the marriage together with their dates of birth or ages ;
- (iii) if prior to the date of the petition there has been any proceedings under the Act between the parties to the petition, the full particulars thereof ;
- (iv) if the petition is for restitution of conjugal rights, the date on or from which and the circumstances under which the respondent withdrew from the society of the petitioner ,
- (v) if the petition is for judicial separation the matrimonial offence alleged or other grounds upon which the relief is sought together with particulars thereof so far as such particulars are known to the petitioner, *e g*

1. In the case of desertion, the date and circumstances under which it began

2. in the case of cruelty or sexual intercourse with any person other than his or her spouse, the specific acts of cruelty or sexual intercourse and the occasion when and places where such acts were committed together with the names and addresses of the person or persons with whom the respondent had sexual intercourse

3. in the case of virulent form of leprosy or venereal disease in a communicable form, when such ailment began to manifest itself, the nature and the period of the curative steps taken together with the name and address of the person who treated for such ailment and in the case of venereal disease that it was not contracted from the petitioner

4. in the case of unsoundness of mind, the time when such unsoundness began to manifest itself, the nature and period of any curative steps taken together with the name and address of the person who treated for such unsoundness of mind ;

- (vi) if the petition is for divorce, the matrimonial offence alleged or other grounds upon which the relief is sought together with the full particulars thereof so far as such particulars are known to the petitioner

1. in the case of adultery, the specific acts of adultery and occasion when and place where such acts were committed, together with the name and address of the person with whom such adultery was committed

2. in the case of incurable unsoundness of mind, the time when such unsoundness began to manifest itself, the nature and the period of any curative steps taken together with the name and address of the person who treated for such unsoundness of mind,

3. in the case of virulent and incurable form of leprosy or venereal disease in a communicable form, when such ailment began to manifest itself, the nature and period of any curative steps taken together with the name and address of the person who treated for such ailment

4. in the case of presumption of death, the last place where the parties lived together and the date when and the place where the respondent was last seen or heard of as alive and the steps, if any, taken to ascertain his or her whereabouts ;

(vii) if the petition is for a decree for nullity of a marriage on the ground specified in clause (c) or clause (d) of Section 12 of the Act, the time when the facts relied on were discovered and whether or not marital intercourse with the consent of the petitioner took place after the discovery of the said facts

(b) The petition shall set out at the end of the relief or reliefs sought including any claim for (i) custody, care and maintenance of children, (ii) permanent alimony and maintenance, (iii) costs.

Where a claim is made under clause (ii) afove, the petition shall specify the annual or capital value of the respondent's property, the amount of his or her annual earnings and other particulars relating to his or her financial resources and particulars relating to the petitioner's income and other property

5. **Contents of written statement.**—Every written statement in answer to a petition for restitution of conjugal rights shall set out the particulars as far as may be, set out in clauses (v), (vi) and (vii) of sub-rule (a) of rule 4.

6. An application under the proviso to Section 14 of the Act for leave to present a petition for divorce before three years* have passed from the date of the marriage, shall be supported by an affidavit setting forth the circumstances relied on as constituting exceptional hardship to the petitioner or depravity on the part of the respondent

7. When a petition is admitted, the chief ministerial officer of the Court shall assign a distinctive number to the petition and all subsequent proceedings in the petition shall bear the number.

8. Along with the petition, the petitioner shall furnish a copy thereof for service on the respondent and if a co-respondent has been impleaded, an additional copy for service on him, together with the fee prescribed under the Madras Court-Fees and Suits Valuation Act, 1955, for service of notices.

9. (i) Notice of the petition shall be in Form No. 2 for the settlement of issues and shall require the respondent and the co-respondent if one is named in the petition to enter appearance in person or by pleader and file a written statement not less than seven days before the day fixed in the notice,

(ii) the notice together with a copy of the petition shall be served on the respondent and the co-respondent, if named, in the manner prescribed for the service of summonses in suits not less than twenty-one days before the day appointed therein

10. Appeals in the High Court from the decrees and orders of the district Courts shall be governed by the rules of the High Court, Madras Appellate Side as far as they may be applicable

FORM No. 1.

(Rule 3)

In the Court of the District Judge/in the City Civil Court, Madras Original Petition No.
of. . . 19

In the matter of the Hindu Marriage Act, 1955.

* Now one year

A B..... *Petitioner*

versus

C D..... *Respondent.*

Petition under section of the Hindu Marriage Act, 1955, and rule.....
of the rules under the Hindu Marriage Act.

FORM No. II.

In the Court of the District Judge/in the City Civil Court, Madras.

Original Petition No. of19.....

In the matter of the Hindu Marriage Act, 1955.

A B..... *Petitioner*

versus

C D..... *Respondent.*

Petition presented on

Petition filed on

Notice issued on..... ..

Whereas on the day of 19 the above-named petitioner filed a petition against the respondent for (specify the relief) you are hereby required to appear in the Court on the ... day of 19 at 10-45 A.M. in the forenoon in person or by pleader duly instructed and able to answer all material questions relating to the above proceeding Also take notice that in default of your appearance on the aforesaid day the issues will be settled and the petition heard and determined in your absence

You shall also bring with you or send through your pleader the documents which the petitioner desires to inspect and any documents on which you intend to rely in support of your defence. You are required to file written statement in Court on or before.....the day of19.....

Given under my hand and the seal of this Court this.....day of.....19.....

District Judge/ Principal Judge.

NOTES :—1. A copy of the petition accompanies this notice.

2. This notice should be served not less than 21 days before the day fixed above for settlement of issues.

3. Should you apprehend that your witnesses will not attend of their own accord, you can have summons issued from the Court to compel the attendance of any witness and the production of any document that you have a right to call on the witness to produce on applying to the Court and on depositing the necessary expense.

This notice has been taken out by Shri.....Advocate/Pleader for the petition.

High Court, Madras.

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